Forasol

Vs

Oil and Natural Gas Commission

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Forasol

Civil Appeals Nos. 628 and 629 of 1981

(D. P. Madon, Sabyasachi Mukharji JJ)

25.10.1983

JUDGMENT

MADON J. –

1. These cross appeals by special leave arise out of execution proceedings adopted by Forasol, a French company, having its principal office in Paris, France, against the Oil and Natural Gas Commission, a statutory body incorporated under the Oil and Natural Gas Commission Act, 1959 (Act XLIII of 1959), hereinafter for the sake of brevity referred to as 'ONGC'.

2. On July 30, 1962 the Government of India invited global tenders for structural drilling for exploration of oil in the Jaisalmer area of the State of Rajasthan. The tender of Forasol was accepted by the Government of India and pursuance thereof a contract dated February 17, 1964, headed "Structural Drilling Contract", was entered into between ONGC and Forasol. Under the said contract, ONGC engaged Forasol to carry out structural drilling in relation to the exploration for oil in the Jaisalmer area of the State of Rajasthan on the terms and conditions contained in the said contract. The said contract was for a period of one year commencing from the date of the start of the drilling work. The said contract also gave an option to ONGC to extend the period by one more year. Article IX-3 of the said contract dealt with the currency of payment. It provided as follows :

> IX-3.1. The operational fee, standby fee and equipment charges payable to Forasol have been specified in French francs in Articles IX-1.1.1. to IX-1.1.10 above. The amount payable to Forasol on account of aforesaid fees and charges shall be computed in French francs. ONGC shall pay 80 per cent. of the aforesaid amount in French francs and the remaining 20 per cent. in Indian rupees using a fixed conversion rate of FF 1.033 = Re 1.000.

Under Article IX-3.2 the cost as well as the insurance, packing, forwarding and clearing charges in respect of the material provided by Forasol and the freight, insurance, packing, forwarding and clearing charges for transportation from a seaport or airport in French to India and back to a seaport in France or outside France if Forasol so chose, in respect of the rig, equipment, machinery, tools and other materials provided by Forasol were to be reimbursed to Forasol by ONGC in Indian

rupees, if the expenditure was initially incurred by Forasol in Indian rupees, otherwise in French francs.

3. Under a Credit Agreement arrived at between the Government of India and the Government of France, the Government of France had agreed to provide credit facilities to a limited extend to the Government of India for the import of plant, machinery, equipment and materials and for execution of certain projects including oil exploration. Under the said Credit Agreement, credit was to be give by the French suppliers to the Indian buyers in the form of acceptance of payments on deferred basis upon the conditions laid down in the letters dated February 5, 1962, exchanged between the Governments of India and France. Consequently, in respect of the said contract, Forasol had agreed under Article X-1.1 thereof to accept payment of its fees, costs and charges payable in French francs on deferred basis under the overall conditions of the said letters exchanged between the two Governments and Forasol and ONGC and agreed upon the estimates of the payments to be made to Forasol in French francs under the said contract, the invoicing rules and the mode of payment. Articles X-2, X-3, and X-4 of the said contract set out such estimates, invoicing rules and the mode of payment. Under Article X-3.3, Forasol was to indicate in each of its invoices the amount payable to it in French francs and the amount payable to it in Indian rupees under the said contract. So far as the mode of deferred payment of French francs was concerned, Article X-4.1.1. provided for remittance by ONGC in French francs immediately following the singing of the said contract of a sum of FF 73,437.49, being the 10/800th part (i.e. 1.25 per cent.) of the total estimated amount of Forasol's operational and standby fees and equipment charges, cost of the materials to be provided by Forasol and transportation charges in respect of Forasol's rig, equipment, machinery and tools. Under Article X-4.1.2, subsequent to the above remittance ONGC was to remit to Forasol in French France 15/800th part (i.e. 1.875 per cent.) of total estimated amount in respect of said items mentioned above, that is, FF 110,156.23 on each fifth day of August and February, the first of such payments to be made on August 5, 1962 and the last on February 5, 1965. Article X-4.2 provided for payment by ONGC to Forasol of the balance of the amount due to Forasol. Under Article X-4.2.1, on receipt of each of Forasol's invoices in respect of operational fees, standby fees and equipment charges accepted by ONGC, Forasol was to present to ONGC a set of 14 promissory notes payable to CNEP (Paris) of equal value totalling to 87.5 per cent. of the French france portion of the amount for which each of the said invoices had been accepted by ONGC and maturing on the fifth day of August and of February, the first such dates being August 5, 1965 and the last being February 5, 1972. Within fifteen days of the date of receipt of the said promissory notes, ONGC was to return the said promissory notes to Forasol (Paris) duly signed and stamped.

4. Article X-4.2.2 provided for payment of the said promissory notes. The said article was as follows :

> X-4.2.2. ONGC binds itself irrevocably, to pay in French francs the promissory notes give by it to Forasol. Forasol shall present the promissory notes to CNEP (Paris) for collecting payment on the dates of maturity. ONGC shall place with CNEP (Paris), at least one day before each date of maturity, adequate funds to cover the total value of the promissory notes maturing on that date.

5. Under Article X-4.3 ONGC undertook to pay to Forasol in French francs simple interest at the rate of 5 per cent. per annum and also a credit insurance charge at the rate of 1.08 per cent. per annum. The other sub-articles of Article X-4.3 provided for calculation of interest and insurance charges and for submission by Forasol every six months of invoices in respect thereof. Article X-4.3.2, inter alia, provided that -

ONGC shall accept each invoice for the interest and insurance charge and shall remit the invoiced amount to Forasol in French francs as early as possible but not later than two months after receipt of the invoice.

Provision was also made by the said Article X-4.3.2 for drawing of promissory notes payable at CNEP (Paris) maturing on each fifth day of August and of February, the first of such dates being August 5, 1965 and the last being August 5, 1971. Under Article X-4.3.3. ONGC bound itself, "irrevocably, to pay in French francs the promissory note for interest and insurance charge give by it to Forasol". Article XI provided for payments to be made to Forasol in Indian rupees. Under Article XI-1.1 the rupee payment part of the operational and standby fees, equipment charges and transportation charges payable to Forasol under the said contract was estimated to be FF 1,495,216 and ONGC was to pay to Forasol as an advance 10 per cent. of the said amount, namely, FF 149,522, in Indian rupees using a conversion rate of FF 1.033 equal to Rupee 1.000. The balance amount in respect of the aforesaid item was to be paid by ONGC to Forasol in Indian rupees using a conversion rate of FF 1.033 equal to Rupee 1.000 in the manner set out in the other sub-articles of Article XI.

6. On account of the hostilities between Pakistan and India which broke out in September 1965 the work under the said contract could not be completed and the operations to be carried out thereunder had to be suspended. The period of the said contract was thereupon extended by a supplementary agreement being Addendum No. 1 dated December 6, 1965, by a period of six months with effect from the date on which the drilling operations in the Jaisalmer area were resumed at the expiry of the period of suspension. By another supplementary agreement being Addendum No. 2 dated July 30, 1966, the period of the said contract was further extended by a period of five months from the moment at which all the equipment of Forasol then under repair at Jodhpur arrived, after completion of the repairs at the new drill-site, where ONGC might like to have drilling operations to be started under the said Addendum No. 2. Article 2.7 of the said Addendum No. 2 provided as follows :

> 2.7. In case Forasol has to refund to ONGC an amount which cannot be adjusted or has not been adjusted against Forasol's invoices for the last two months of the five months' period of this Addendum, Forasol shall refund the amount in cash in the same currency in which ONGC had paid it earlier.

By another supplementary agreement being Addendum No. 3 dated February 23, 1967, there period of the contract was further extended till the completion of the drilling of Manhere Tibba Well No. 1 and in case ONGC should decided to test the said well till the completion of such test or till April 18, 1967, whichever was earlier. Article 2.5 of the said Addendum No. 3 provided as follows :

> 2.5. In case Forasol has to refund to ONGC an amount which cannot be adjusted or has not been adjusted against Forasol's invoices for the period of extension stipulated in Article 1.2 above, Forasol shall refund the amount in cash in the same currency in which ONGC had paid it earlier.

It may be mentioned that each of the said supplementary agreements provided that all the terms and conditions of the original contract which were not repugnant to the terms and conditions agreed to for such supplementary agreements were to continue to apply until the termination of the said contract.

7. The extended period of the said contract expired on April 13, 1967.

8. In June 1966, during the extended period of the said contract, the Indian rupee was devalued, and consequently in the course of correspondence which till place between the parties Forasol made a claim for conversion of Indian rupees into French francs at rate higher than the rate specified in Article IX-3 of the said contract.

9. It may also be mentioned that ONGC paid to the income-tax authorities towards the income-tax liabilities of Forasol three sums aggregating to Rs 11,95,304 as specified below :

(1) Rs 1,25,304 on September 14, 1967,

(2) Rs 4,70,000 on February 14, 1968, and

(3) Rs 6,00,000 on March 23, 1968.

10. During the period of extension covered by the said Addendum No. 3 and after the expiry of that period disputes and differences arose between the parties. These were referred to arbitration as provided in the said contract. The parties appointed their respective arbitrators. The time for making the award was extended from time to time with the consent of the parties but as Forasol did not consent to any further extension, the disputes were referred for arbitration to Mr N. Rajagopala Iyyangar, a retired Judge of this Court, being the Umpire appointed by arbitrators. In the arbitration proceedings Forasol made claims against ONGC and ONGC made counter-claims against Forasol. On March 8, 1972, the Umpire entered upon the Reference and on December 21, 1974, the Umpire made his award. To the said award an erratum was annexed by which a particular portion of the said award was deleted and substituted by a fresh portion to which we will revert later. For the present, suffice it to say that by the said erratum the Umpire awarded that the from November 30, 1966 the rupee portion should be converted at the rate FF 1000 equal to Rs 1517.80 instead of the rate of exchange of FF 1.033 equal to Re 1.000 provided in Article IX-3.1. of the said contract and that this enhanced rate of exchange would apply to both Forasol and ONGC.

11. The said award was filed in the Delhi High Court and on May 7, 1975, a decree in terms thereof was passed by that High Court with interest at the rate of 6 per cent. per annum from the date of the decree till the date of payment of the net decretal amount. It is pertinent to note that neither party raised any objection to the said award or to the form in which the said decree was passed.

12. After the said decree was drawn up, Forasol filed in March 1976 an application for execution of the said decree being Execution No. 77 of 1976. Under the said award certain amounts were directed by the Umpire to be paid to Forasol by ONGC in French francs and certain amounts in Indian rupees, and amounts payable by Forasol to ONGC were to be adjusted and set off against the amounts payable by ONGC to Forasol. In the said execution application the rupee credit in favour of Forasol was converted into French francs at the rate of Rupees 1.5178 equal to FF 1.000 being the enhanced rate of exchange specified in the said award. After deducting the amounts payable to ONGC the balance to Forasol was shown as FF 5,89,727.51 being the equivalent of Rs 11,79,455 with interest on the principal sum upto the date of payment and the costs of execution. The mode of execution specified in the said execution application was attachment and sale of the movable proprieties belonging to ONGC and specified in an annexure to the said execution application. In its objections to the said execution application ONGC contended that the enhanced rate of exchange specified in the said award was only with respect to the interest payable to Forasol from November 30, 1966 and that to the rest of the payments to be made under the said award the rate of exchange mentioned in Article IX-3.1, namely, FF 1.003 equal to Rupee 1.000, was applicable and that this

contract rate of exchange applied both to the French franc part as also the Indian rupee part of the said contract. ONGC also raised certain other contentions. On the basis of these contentions, it was submitted by ONGC that instead of any amount being due to Forasol a sum of Rs 6,43,831.44 was due by Forasol to ONGC. the learned Single Judge of the Delhi High Court who heard the said execution application rejected all the contentions of ONGC. He held that the contract rate of exchange applied only to the rupee part of the payment in respect of the items specified in Article IX-3.1 of the said contract and that in respect of such payments from November 30, 1966, the enhanced rate of exchange provided in the said award was to apply but in respect of the other payments to be made to Forasol in French francs the rate of exchange prevailing at the date of the decree, namely, FF 1.000 equal to Rs 1.938 would apply. The learned Single Judge directed that ONGC could satisfy the judgment debt by making payment in French francs or, if it so preferred, by paying the equivalent of it in Indian rupees at the rate of exchange prevailing at the date of the decree and further ordered that if the decretal amount was not paid within two weeks, attachment as prayed for should issue. Against the said judgment and order of the learned Single Judge ONGC filed an inter-court appeal being E.F.A. (OS) 5 of 1977. The Division Bench of the Delhi High Court, which heard the said appeal, upheld the contention of ONGC that the enhanced rate of exchange specified in the said award applied only to the interest payable to Forasol and that with respect to the rupee amount due to ONGC and which was to be adjusted against French francs payable to Forasol, the contract rate of exchange applied. It further held that as the said award was in French francs, by reason of the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973), before executing the said award the French francs would have to be converted into Indian rupees at the rate of exchange prevailing on the date of the said award, namely, FF 1.000 equal to Rupee 1.831. The Division Bench negatived the other contentions raised by ONGC. It is against this judgment and order of the Division Bench of the Delhi High Court that the present cross appeals have been filed.

13. So far as Forasol's appeal is concerned, four points were urged on its behalf before us. There points were :

> 1. The rate of exchange specified in Article IX-3.1 of the said contract, namely, FF, 1.033 equal to Re 1.000, was applicable only to 20 per cent. of the payment to be made in Indian rupees by ONGC to Forasol.
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> 2. The Umpire by the said award fixed the rate of the exchange at FF 1.000 equal to Rs 1.5178 as from November 30, 1966. in respect of such rupee payments only.
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> 3. The sum of Rs 10,19,380.39, being the balance amount of the sum of Rs 11,95,304 which remained payable to ONGC by Forasol in respect of the income-tax paid by ONGC on behalf of the Forasol after making adjustments against the claim of Forasol, was to be adjusted, as directed by the said award, against Forasol's claim in French francs on the respective dates of each payment of tax, namely, on September 14, 1967, February 14, 1968, and March 23, 1968, and as all these payments were made after November 30, 1966, and as under the said award the enhanced rate of exchange was directed to apply to both parties, the said sum of Rs 10,19,380.39 was to be adjusted against the French franc claim of Forasol at the enhanced rate of FF 1.000 equal to Rs 1.5178.
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> 4. So far as the payment to Forasol in French francs was concerned, neither the said contract nor the said award provided for conversion of French francs into Indian

rupees and the said decree have been passed in foreign currency, in case ONGC did not or could not make payment in French francs, the rate of conversion of French francs into Indian rupees could only be at the rate of exchange prevailing at the date of the said decree, that is, on May 7, 1975, which was FF 1.000 equal to Rs 1.938.

14. ONGC, on the other hand, submitted that the said contract provided a fixed rate of exchange of FF 1.033 equal to Re 1.000 for all amounts payable under the said contract, whether in rupees or in French francs, and therefore, that rate alone should be taken as the correct conversion ratio except with respect to interest on the amount in French francs payable to Forasol in respect of which the Umpire had enhanced the rate of exchange to FF 1.000 equal to Rs 1.5178. In the alternative, it was submitted that the conversion rate should be the one prevailing at the date of the said award, that is on December 21, 1974, namely, FF 1.000 equal to Rs 1.831.

15. Thus, there are four different rates of exchange which feature in this case, namely, -

#Rate provided the said contract FF 1.033 = Re 1.000Rate fixed by the Umpire FF 1.000 = Rs 1.5178Rate at the date of the saidaward, namely, on December 21, 1974 FF 1.000 = Rs 1.831Rate at the date of the decree,namely, on May 7, 1975 FF 1.000 = Rs 1.938##

16. We shall first examine the said contract to determine whether the rate of the conversion mentioned in the said Article IX-3.1 applied

only to 20 per cent. of the amounts in French francs payable by ONGC to Forasol in Indian rupees in respect of Forasol's operational fee, standby fee and equipment charges as contended by Forasol or whether it applied to all payments to be made under the said contract, whether in rupees or in French francs, as contended by ONGC. In doing so, a cardinal fact must be borne in mind, namely, that it was a contract entered into between a foreign party and a Government of India undertaking and that under the said contract the foreign party had agreed to carry out structural drilling in relation to the exploration for oil, discovery of oil being of vital importance to the national interests of India. From the nature of things, the foreign party would not desire payment for the services to be rendered and the equipment to be supplied by it in a currency with which it had not connection and of the continuous stability of which it could not be certain. The foreign party would, therefore, naturally desire and bargain for payment in currency of its own country, namely, in French currency. The more so, as under the Credit Agreement entered into between the Government of France and the Government of the India the Government of France had agreed that credit should be give by French suppliers to Indian buyers by accepting payment on deferred basis for the import of plant, machinery, equipment and materials and execution of certain projects including oil exploration, and, accordingly, under Article X-1.1 of the said contract the French party, Forasol, had agreed to accept on deferred basis payment of the amounts due to it in French fences. We have earlier referred to the relevant articles of the said contract as also extracted some of them in order to emphasize the though under the Article IX-3.1 Forasol had agreed to accept 20 per cent. of its operational fee, standby fee and equipment charges in Indian rupees, it wanted that the remaining 80 per cent. of these fees and charges as also the other amounts which were payable to it under the said contract should be paid to it in French francs only and should not be made dependent upon the stability of the Indian rupee in the intentional monetary market. To recapitulate, the invoicing rules provided that in each of its invoices Forasol should indicate separately the amount payable to it in French francs and the amount payable to it in Indian rupees and that so far as the French franc part was concerned, an initial payment was to be made immediately upon the singing of the said contract and the balance

was to be paid by remittances in French francs. Such remittances were to be made by Forasol presenting to ONGC a set of promissory notes payable in Paris and under Article X-4.2.2 of the said contract ONGC irrevocably bound itself to pay in French francs the promissory notes gives by it to Forasol. Similar provisions were made in the said contract for payment of interest and insurance charges to Forasol. If Forasol were to indicate separately in its invoices the payment to be made to it in French francs and in Indian rupees and if the payment of such French francs was to be made in Paris in French francs, the question of providing for a rate of exchange in the said contract for converting French francs into Indian rupees cannot arise. Such conversion rate could only be in respect of the amounts payable to Forasol in Indian rupees. It is pertinent to note that under Article IX-3.1 the amount of fees and charges payable to Forasol were to be computed in French francs and thereafter 80 per cent. thereof was to be paid in French francs and the remaining in Indian rupees. Even with respect to such twenty per cent. Forasol did not want to be dependent upon a possible fluctuation in the exchange rate of rupee and, therefore, the 20 per cent. part of the amount computed in French francs was covenanted to be converted at a fixed rate provided in the said Article IX-3.1. This is made abundantly clear by the express terms of the said Article IX-3.1 when it states that "ONGC shall pay 80 per cent. of the aforesaid amount in French francs and the remaining 20 per cent. in Indian rupees using a fixed conversion rate of FF 1.033 = Re 1.000". It is thus only the 20 per cent. of the said fees and charges computed in French francs in Forasol's invoices but payable in Indian rupees which was to be converted at the aforesaid rate of exchange specified in the said contract. This interpretation receives further support from Article 2.2 of Addendum No. 2 and Article 2.5 of Addendum No. 3 extracted above under which amounts refundable by Forasol to ONGC were to be refunded in the same currency in which ONGC had paid them earlier. The contention of ONGC that the fixed rate of conversion provided in Article IX-3.1 applied to all payments to be made under the said contract to Forasol must, therefore, be rejected.

17. What next falls to be considered is whether the enhanced rate of exchange specified by the Umpire in the said award applied only to the amount payable by way of interest to Forasol as contended by ONGC. This contention was rejected by the learned Single Judge but found favour with the Division Bench of the Delhi High Court. It is necessary to set out some further facts in order to decide this point. During the course of the hearing before the Umpire, ONGC had filed a statement showing the adjustment of the amount of French francs due to Forasol against the amount of income-tax paid by ONGC on behalf of Forasol. It was however, erroneously assumed by the Umpire that the said statement was an agreed one. After the Umpire had dragged his award he handed over a copy of it to the parties in order that they might point out to him any incorrect statements or mistakes of a clerical or similar nature so that he could correct the same before the award was made and published. Accordingly, both the parties appeared before the Umpire and agreed that there were certain errors in the draft award and requested the Umpire to correct these errors before he made and published his award. The Umpire thereupon corrected the errors jointly pointed out to him by the parties the by appending an erratum to the said award. In the said erratum the Umpire pointed out that the aforesaid statement was not an agreed one and he directed that certain portions of the award should be deleted an substituted by fresh paragraphs set out in the said erratum. In the said erratum the Umpire first pointed out certain errors of calculation and in the mentioning of figures which had been occurred. He then proceeded to state :

> Incidentally it was pointed out that the statement on pages 145-6 and in the penultimate and last two paragraphs on page 149 regarding the document filed before me, as regards the adjustment of FF claims due to Forasol against the income-tax paid by ONGC was not an 'agreed statement', but a statement prepared by ONGC on their own to which Forasol had not consented. As a result of this, the question of

> adjustment of the income-tax paid against FF claims, as set out in the last para on page 149 and in the first two paragraphs on page 150 would be deleted and in their place the Award would state that "the amounts of income-tax paid by ONGC shall be adjusted against the FF claims due to Forasol on the date when each amount was paid in the manner set out earlier in the Award".

To achieve this purpose the paragraphs on pages 149 and 150 beginning with the words "In the calculation of the interest on the several invoices" and ending with "I have already dealt with the conversion rate and there is no need to go into it again" on page 150 shall be deleted and a new paragraph inserted, which will read as follows :

> #* * *##

... as a result the aggregate figure of interest payable to Forasol by ONGC upto June 30, 1974 would be FF 12,91,290.06. From this a small adjustment has to be made.... When these are adjusted the amount due for interest ONGC to Forasol would be FF 12,88,185.35.

This figure of FF 12,91,290.06 has been calculated on the basis of the conversion rate of FF 1.033 to a rupee (or FF 1033 for every Rs 1000) which was the rate of exchange agreed to between the parties under Article XI-1.1.1 of the Agreement. Messrs Forasol have put forward before me a claim for enhanced rate of interest and their claim is that this should be Rs 1.5178 for every FF or Rs 1517.80 for every FF 1000. I find that there is considerable correspondents in the course of which they have made a claim that after devaluation of the rupee there should be a change in the rate of exchange. Though there is no specific letter in the file agreeing to the enhancement I find that in the later invoices demanded had been made subject to the claim for enhanced rate of exchange. In view of this I consider that from November 30, 1966 Rupee portion should be converted at FF 1 = Rs 1.5178 or FF 1000 = Rs 1517.80. Of course this rate of exchange would apply to both the parties, Forasol and the ONGC.

As stated earlier this has been worked out only upto June 30, 1974 and in accordance with the directions contained in this award interest shall be calculated on the principal amount right upto December 21, 1974 on the entire amount of principal and the entire sum of principal and interest would thereafter carry interest at 6 per cent. per annum, as stated in the other portion of the award.

18. Article IX-1.1 of the said contract referred to in the said erratum provided as followed :

> XI-1.1.1. On the basis of the figures arrived at the Articles IX-2.1 and IX-2.2 above and in accordance with the condition laid down in Article IX-3.1 above, the total of Forasol's operational and standby fees, equipment charges and transportation charges payable in Indian rupees under this contract, is estimated to be FF 1,495,216. Following signature of this contract, ONGC shall pay to Forasol, as an advance, 10 per cent. of this amount i.e. FF 149,522 in Indian rupees using a conversion rate of FF 1.033 = Re 1.000.

19. In order to reach the conclusion which it did, the Division Bench of the Delhi High Court relied upon that portion of the said erratum where the Umpire has stated that Forasol had put forward before his a claim for "enhanced rate of interest", overlooking the other portions of the said erratum, particularly the portion emphasized by us in the above extract as also the fact that by the said erratum certain portions of the said award were deleted and substituted by fresh paragraphs. On a

perusal of the above extract from the said erratum, it is obvious that the claim made by Forasol was not for an enhanced rate of interest but for an enhanced rate of exchange by reason of the devaluation of the rupee. This is made clear by the rest of very same sentence in the said erratum in which this claim made by Forasol was referred to, namely, "and their claim is that this should be Rs 1.5178 for every FF or Rs 15,178 for every FF 1000". If the claim of Forasol was for an enhanced rate of interest, the claim would have been that interest should be payable to it not at the contact rate of five per cent. per annum but at a higher rate and not that a higher rate of exchange should be provided. The very next sentence which also we have emphasized clarifies that in the correspondencs which took place between the parties, Forasol had made a claim that after devaluation of the rupee there should be a change in the rate of exchange. Obviously, this change would be with respect to the rupee payment to be made to Forasol. The very direction of the Umpire in this behalf makes it clear that he was not dealing only with the rate of interest for by the said direction, which too we have emphasized in the above extract, the Umpire awarded that from November 30, 1966, "Rupee portion should be converted at FF 1 = Rs 1.5178 or FF 1000 = Rs 15,178" and he further awarded that "this rate of exchange would apply to both the parties, Forasol and the ONGC". The question of the enhanced rate of exchange applying to both the parties would not arise if the enhanced rate of exchange was with respect only to the interest payable to Forasol.

20. We are fortified in the conclusion we have reached by the fact that so far as the adjustment of claim of ONGC with respect to income-tax paid by it was concerned, the Umpire by the said erratum expressly deleted from the said award the portion in which such adjustment was made at the contract rate of FF 1.033 equal to Re 1.000 and substituted it by fresh paragraphs. Under the said erratum these amounts were directed to be adjusted from November 30, 1966 at the enhanced rate of exchange provided in the aid erratum as all these amounts were paid by ONGC after the said date.

21. Another fact which fortified this conclusion is that by the last paragraph of the portion of the said erratum extracted above, in addition to an enhanced rate of exchanged, the Umpire has also awarded a higher rate of interest, namely, six per cent., on the entire sum of principal and interest from December 22, 1974.

22. The Division Bench of the Delhi High Court was, therefore, in error in holding that the enhanced rate of exchange specified in the said award applied only to the amount of interest payable to Forasol. For the reasons stated above we find that this enhanced rate of exchange applied to the payments in Indian rupees under Article IX-3.1 of the said contract to be made by ONGC to Forasol from and after November 30, 1966.

23. The question which now remains to be considered in Forasol's appeal is the date to be selected by the Court for cavorting into Indian rupees the French franc part of the said award in respect of which not 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 realized.

25. In a case where a decree has been passed by the Court in terms of an award made in the 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 terms of the such an award has been passed by the Court.

26. The said award directed certain payments to be made in a foreign currency, namely, French francs, and did not specify the rate of exchange at which the French francs were to be converted into Indian rupees and the decree which was passed by the Delhi High Court was in terms of the said award simpliciter without fixing any date for conversion of the French into Indian rupees. As mentioned earlier, neither party filed any objection to the said award or to the passing of the decree in the terms in which it was passed. The question whether an arbitrator or umpire can make an award in foreign currency is, therefore, not directly in issue before us nor the question whether a court can simpliciter pass a decree in terms of such an award without specifying the rate of exchange at which the foreign currency amount will have to be converted into Indian rupees. Thought at the first blush these question do not appear to arise for our determination, they are inextricably linked with the question which we have to decide and we will, therefore, have to address ourselves to them in due course.

27. The question which one out of the dates mentioned above is the proper date to be selected by the Court does not appear to have been decided in this country, and no authority of any Indian court on this point has been brought to our notice. The question, however, has formed the subject-matter of decisions in England and both the learned Single Judge as also the Division Bench of the Delhi High Court have referred to the decision of the House of Lords in Miliangos v. George Frank (Textiles) Ltd. (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)) and other English cases. They have, however, reached differing conclusions, the learned Single Judge holding that the conversion of French francs into Indian rupees should be made at the rate of exchange prevailing on the date of the said decree and the Division Bench holding that such conversion should be at the rate of exchange prevailing at the date of the said award. It will be convenient, therefore, to turn now to the English decisions on the point to ascertain whether we can find some guidance from them in arriving at our conclusion. The judicial view on this point in England has undergone a radical change and it will not be out of place to ascertain the earlier view which he courts in England took and the view which now prevails with them and to take a brief survey of how this change in view came about.

28. In Tomkinson v. First Pennsylvania Banking and Trust Co. (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)), (better known as the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) on appeal from the decision of the Court of Appeal, sub-nom In re, United Railways of the Havana and Regla Warehouses Ltd. (1960 Ch 52 : (1959) 1 All ER 214 (CA)) after reviewing the earlier authorities, the House of Lords held that an English court cannot give judgment for payment of an amount in foreign currency, and that for the purposes of litigation in England a debt expressed in a foreign currency must be converted into sterling with reference to the rate of exchange prevailing on the date when the debt was payable. Lord Denning, who was then a member of the House of Lords, delivered a concurring judgment in which he pointed pointed out that the origin of this rule was that sterling was for a long time regarded as a stable currency, the

constant unit of value by which, in the eye of the law, everything else was measured, and that so long as sterling was regarded as stable while other currencies fluctuated, justice was best done by taking the rate of exchange at the date of the breach, the creditor being entitled to be put into as good a position as if the debtor had done his duty and paid the debt on the due date and the creditor was only truly put into such a position if the debt was converted into sterling at that date. At the same time Lord Denning also posed a question whether the rule was still to be applied when sterling had lost the value which it once had by reason of the devaluation of the pound. He, however, came to the conclusion that though such a rule was apt to produce an injustice to a foreign creditor who was owed money in the currency of his own country, if he chose to sue in English courts instead of his own, he must put up with the consequences. The rule affirmed in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) is known as the "breach date rule".

29. The next decision which requires to be noticed is that of the Court of Appeal in Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc. ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) As this authority was relied upon by the Division Bench of the Delhi High Court in order to arrive at its decision on this part of the case and as it formed the sheet-anchor of the submission made on behalf of ONGC that the proper date of conversion should be the date of the award, it is necessary to examine what was decided in this case in some detail. In that case, the Plaintiffs were awarded a sum expressed in United States dollars in an arbitration held in London. The defendants having failed to pay the sum awarded, the plaintiffs ought leave of the Court under Section 26 of the Arbitration Act, 1950, of England to enforce the award. In support of their application, the plaintiffs filed an affidavit showing the rate of exchange prevailing at the date of the award and the amount of the award in pound sterling and claimed the amount due under the award on the said basis. The questions which fell for determination were whether an award expressed in a currency other than sterling was valid and lawful and, if so, whether it was enforceable under the said Section 26. The Master dismissed the application and the order of dismissal was affirmed by Kerr, J. On appeal, the Court of Appeal held that the award was valid and leave should be granted to enforce it. On the question whether English arbitrators have jurisdiction to make an award for payment in a foreign currency, the Court held that in a proper case they could do so and that in the case before them since the money of account and the money of payment under the charter-party out of which the disputes between the parties arose were expressed in United States dollars the arbitrators were entitled to make their award in the same currency. It was further held that leave should be granted to enforce an award expressed in a foreign currency provided the applicant had filed an affidavit showing the rate of exchange prevailing at the date of the award and giving the amount of the award converted into sterling. When that case fell to be decided Lord Denning was a member of the Court of Appeal, having accepted appointment as Master of the Rolls. In the course of his judgment in that case, Lord Denning, M.R. said (at pages 501-2) :

> The reason why some people have thought that an award by English arbitrators must be in sterling is because they have regarded it as equivalent to a judgment by an English Judge which must be in sterling. But there is this difference. When commercial men are in dispute and go to arbitration, they wish to have the dispute resolved. They want a decision one way or the other. Once given, they abide by it. The losing party pays up. There is rarely any need to call in the sheriff or his officer to enforce the award. So it is perfectly fair, as between them, for the arbitrator to make his award in the currency which is appropriate to their dealings. But, when a plaintiff goes to a court of law, it is, as often as not, because the defendant cannot pay or will not pay. The plaintiff wants to get judgment against him and, if need be, levy execution on his effects. This is so much in the mind of the courts that they have

> ruled that they will give judgment only in sterling. That is the one currency which is known to the court and to the sheriffs and their officers. I venture to suggest that this view of the courts should be open for reconsideration. If the money payable under a contract is payable in a foreign currency, it ought to be possible for an English court to order specific performance of it in that foreign currency; and then let the exchange be made into sterling when it comes to be enforced. I know that this is not yet the law. There is high authority against it : see Re United Railways of the Havana and Regla Warehouses Ltd. (1960 Ch 52 : (1959) 1 All ER 214 (CA)) But the House of Lords have since then held that specific performance can be ordered of a contract to make a money payment : see Beswick v. Beswick (1968 AC 58 : (1967) 2 All ER 1197 : (1967) 3 WLR 932 (HL)). This may point the way to a relaxation of the old rule and enable the courts, in proper circumstances, to order payment into a foreign currency, such as is suggested by Dr Mann in his book (The Legal Aspect of Money, Third Edn. (1971), p. 363).

At any rate, there is no reason why the rule about judgments of the courts should be extended to awards by arbitrators. I think we should hold that arbitrators have jurisdiction to make an award in a foreign currency whenever that is the proper currency in which payments under the contract should be made.

The next question is the manner of enforcing such on award. It would, no doubt, be possible to bring an action on the award and seek a judgment from the courts in sterling. In that case the rate of exchange would be taken at the date of the award. But another way it to seek the leave of the court under Section 26 of the Arbitration Act, 1950, which says :

> An award on an arbitration agreement may, be leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

If the words 'to the same effect' are read as meaning 'in the same terms', there would be some difficulty in applying this section to an award in a foreign currency. But I do not think they mean 'in the same terms'. They only mean that the judgment or order must have 'the same effect'. If the sum awarded is converted into sterling at the rate of exchange at the date of the award, it does have the same effect. The proper course is for the applicant to file an affidavit showing the rate of exchange at the date of the award and giving also the amount of the award converted into sterling. Then leave will be given to enforce payment of the sum.

It may be mentioned that the defendants did not appear at any stage of the proceedings and were not represented and there was no appeal to the House of Lords from this judgment.

30. Whether we should accept the decision in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) as laying down the correct rule to be applied so far as courts in this country are concerned is a matter which we will discuss after completing our survey of English authorities.

31. The question again arose before the Court of Appeal in Schorsch Meier GmbH v. Hennin ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)). That was not a case of an arbitration but it was an action by a German company against an English firm in an English court for the price of goods in German deutschmarks in which currency the contract stipulated that

payment of the price should be made. The action was commenced by the plaintiffs in the West London County Court for the sum of DM 3756.03 being the amount of the price of goods sold and delivered. Under the contract, the money of account and the money of payment were both German deutschmarks. At the time when the sum had become due, the rate of exchange was pounds 1 equal to DM 8.30. At the rate the sterling equivalent of DM 3756.03 was pounds 452 sterling. Some time later sterling was devalued. As a result pounds 1 sterling was only worth DM 5.85 and consequently the value of pounds 452 had fallen to DM 2664. If the rule in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) applied the plaintiffs would have got judgment for pounds 452 which would have meant only a sum of DM 2664, whereas if they were able to claim and get judgment in deutschmarks the sterling equivalent of DM 3756.03 would be pounds 641. In other words, by getting judgment in sterling, the plaintiffs would lose one-third of the money due to them; whereas by getting it in deutschmarks they would recover the full amount. The plaintiffs declined to give any evidence with reference to the rate of exchange but asked for judgment only in deutschmarks as the Federal Republic of Germany was a member of the European Economic Community. They did do by relying upon Article 106 of the Treaty of Rome which by Section 2(1) of the European Communities Act, 1972, had been made part of the law of England. The County Court Judge held that the said Article 106 had no bearing on the rule of common law and that he could give judgment only in sterling and accordingly dismissed the action. The plaintiffs filed an appeal. In this case too the defendant did not appear and was not represented before the Court of Appeal. The appeal was allowed. With reference to the English law on the subject, apart from the Treaty of Rome, Lord Denning, M.R., after referring to the rule in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)), held that the reasons for the rule had ceased to exist and, therefore, the court was at liberty to discard the rule itself on the principle, "cessante ratione legis, cessat et ipsa lex". He further said (at pages 156-57) :

> Only last year we refused to apply the rule to arbitrations. We held that English arbitrators have jurisdiction to make their awards in a foreign currency, when that currency is the currency of the contract : see Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc. ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)). The time has now come when we should say that when the currency of a contract is a foreign currency - that is to say, when the money of account and the money of payment is a foreign currency - the English courts have power to give judgment in that foreign currency; they can make an order in the form : 'It is adjusted this day that the defendant do pay to the plaintiff' so much in foreign currency (being the currency of the contract) 'or the sterling equivalent at the time of payment'. If the defendant does not honour the judgment, the plaintiff can apply for leave to enforce it. He should file an affidavit showing the rate of exchange at the date of the application and give the amount of the debt converted into sterling at that date. Then leave will be given to enforce payment of that sum.

So far as the Treaty of Rome was concerned, the Court held that the purpose of the said Article 106 was to ensure that the creditor in one member State should receive payment for his goods in his own currency if it was the currency of the contract without any impediment or restriction by reason of changes in the rate of exchange. With respect to the form of the judgment, Lord Denning, with whom Foster, J. concurred, held that he would "adjudge that the debtor do pay to the plaintiff DM 3756.03 or the sterling equivalent at the time of payment" meaning thereby, as Lord Wilberforce pointed out in the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)) (at page 468), the date when the Court authorizes enforcement of the judgment in terms of sterling. Lawton, L.J., the third member of the Court, on the other hand, was of the opinion that the judgment

should be in the form in which the plaintiffs had asked for it, namely, in deutschmarks and the plaintiffs must be left to extricate themselves from the intricacies of the law relating to execution and exchange control. There was no appeal to the House of Lords against this judgment of the Court of Appeal.

32. We now come to the case of Miliangos v. George Frank (Textiles) Ltd. (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)) How that case reached the House of Lords makes interesting reading by itself. Prior to the judgment being delivered in the Schorsch Meier case ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)), Miliangos, a Swiss, brought an action against George Frank (Textiles) Ltd., an English company, claiming the sum of Swiss France 415, 522.45 due to him for the price of polyester yarn sold and delivered to the English company under a written contract. The claim of the Swiss plaintiff was based upon invoices sent to the English company and accepted by that company and alternatively on two bills of exchange drawn in Switzerland by the plaintiff and accepted by the defendants but which had been dishonoured on presentation on their respective due dates. This alternative claim was for the amounts of the said bills of exchange, namely, Swiss Francs 273, 619.45 and Swiss France 27,394 respectively, and the cost of protesting the bills and interest. The plaintiff apparently had been advised about the position in English law and had accordingly claimed judgment in sterling as at the breach date. The defendants claimed that the plaintiff had committed a breach of contract inasmuch as a part of the yarn delivered to them was unfit for the purpose and filed a counter-claim for damages. Thereafter, the plaintiff filed a second suit on another contract in which the claim was on the same alternative counts. Both the actions were consolidated and set down for hearing, but before they reached hearing by their letter dated November 22, 1974, the defendants abandoned their defence and counter-claim and stated that they would submit to judgment. Four days later, on November 26, 1974, the Court of Appeal delivered judgment in the Schorsch Meier case ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)). Thereupon the plaintiff amended the statement of claim in the first action and claimed the amount due in Swiss Francs as an alternative to the claim in sterling. Bristow, J. held that the Schorsch Meier case ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)) so far as it related to countries which were not members of the European Economic Community was obiter and had been decided per incuriam in that only one party had been represented and all the relevant authorities had not been cited. He further held that the decision in that case was inconsistent with what the House of Lords had held in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) and accordingly he gave judgment for the sum claimed in sterling. The plaintiff went in appeal [Miliangos v. George Frank (Textiles) Ltd. ((1975) 1 All ER 1076 (CA))]. The Court of Appeal held that the Schorsch Meier case ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)) was not decided per incuriam and was binding upon the trial court and gave judgment for the plaintiff in Swiss France. The English company went in appeal to the House of Lords. We are not concerned with what was said in that case with respect to whether the Schorsch Meier case ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)) was decided per incuriam or not and whether an English court could depart from the rule in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)). Suffice it to say that the House of Lords by a Majority (Lord Simon of Glaisdale dissenting) held that it was legitimate for the House of Lords to depart from the "breach date conversion" rule and recognize that an English court was entitled to give judgment for a sum of money expressed in a foreign currency in the case of obligations of a money character to pay foreign currency under a contract, the proper law of which was that of a foreign country, and when the money of account was that of that country or possibly of some country other than the United Kingdom. The House of Lords further held that the instability which had overtaken the pound sterling and other major currencies since its earlier decision in the

Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) as well as the procedures evolved in consequence thereof by the English courts and by arbitrators in the City of London to secure payment of foreign currency debts in foreign currency, justified departure from that decision in terms of the Practice Statement (Judicial Precedent ((1966) 1 WLR 1234 : (1966) 3 All ER 77)) (under which the House affirmed its power to depart from a previous decision when it appeared right to do so, recognizing that too rigid an adherence to precedent might lead to injustice in a particular case and unduly restrict the development of the law) since a new and more satisfactory rule could be stated to enable the courts to keep step with commercial needs and would not involve undue practical and procedural difficulties.

33. We are concerned here with that was said in that case with respect to the date to be taken for converting foreign currency into English currency. Lord Wilberforce held (at pages 468-9) that the claim should be made specifically for the foreign currency and to this might be added the alternative "or the sterling equivalent at the date of..." and that as regards the conversion date to be inserted in the claim or in the judgment of the court, though the date of judgment was a workable date, he would favour the date of payment meaning thereby the date when the court authorizes enforcement of the judgment in terms of sterling, because in some cases, particularly where there was an appeal, the date of judgment might impose upon the creditor a considerable currency risk. Lord Wilberforce further observed (at page 469) :

> In the case of arbitration, there may be a minor discrepancy, if the practice which is apparently adopted (see the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA))) remains as it is, but I can see no reason why, if desired, that practice should not be adjusted so as to enable conversion to be made as at the date when leave to enforce in sterling is given.

Lord Cross of Chelsea pointed out (at pages 497-8) that it would be absurd to have one rule with regard to arbitrations on debts expressed in a foreign currency and another with regard to actions on similar debts and that in a case where the defendant failed to deliver foreign currency for the payment of which the judgment was given, the date for its conversion into sterling should be the date when the plaintiff was given leave to levy execution for a sum expressed in sterling. Lord Edmund-Davies, referring to the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)), said (at page 501) that being governed by Section 26 and sub-section (1) of Section 36 (which deals with enforcement of foreign awards) of the Arbitration Act, 1950, the award of American dollars in that case of necessity had to be converted into sterling at the rate of exchange prevailing on the date when the award was made and that but for that fact, the most just rate would be that prevailing when the award was being enforced, for the plaintiff had been kept out of his money until then an there was no reason why this latter rate should not be the one adopted when judgments expressed in a foreign currency are being enforced. According to Lord Edmund-Davies, Miliangos should have been given judgment mutatis mutandis in the form approved of by Lord Denning, M.R. in Schorsch Meier case, ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)) namely, that "it is this day adjudged that the defendant to pay to the plaintiff 416,144.20 Swiss francs or the sterling equivalent at the time of payment", which would mean, as pointed out by Lord Wilberforce (at page 368), the date when the Court authorizes enforcement of the judgment in terms of sterling. Lord Fraser of Tullybelton opined (at page 502) that to take the date of the commencement of the action might result in consequences as unjust as taking the breach date because between the commencement of an action a period of a year or more might easily elapse, allowing for appeals, before payment was made and that the date of judgment would be better but there seemed no reason why the latest practicable date, namely, the date when the Court authorizes

the enforcement of the judgment, should not be taken. Lord Simon of Glaisdale held in his dissenting judgment that there was no reason for departing from the rule laid down in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) and that this should only be done by Parliament on executive or expert advice. With reference to the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) Lord Simon observed (at page 489) :

> If the sterling-judgment rule and the breach-date rule were to be reconsidered by a properly qualified body, no doubt the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) would come within its purview.

34. The principle laid down by the House of Lords in the Miliangos case (1976 AC 443 : (1975) 2 All ER 801 : (1975) 3 WLR 758 (HL)) was extended by it to include a claim based on damages for torts and for breaches of contract in its decision in Owners of the mv Eleftherotria v. Owners of the mv Despina R, The Despina R and Services Europe Atlantique Sud (SEAS) v. Stockholms Rederiaktiebolag SVEA, The Folias (1979 AC 685 : (1979) 1 All ER 421 (HL)), better known as The Despina R (1979 AC 685 : (1979) 1 All ER 421 (HL)), in two appeals heard one after the other and disposed of by a common judgment.

35. The first appeal arose out of a collision between two Greek ships, the Despina R and the Eleftherotria, in which the latter was damaged. The Eleftherotria was owned by a Liberian company which had its head office in Piraeus. The managing agents had their principal place of business in New York and the bank account used for moneys received and payments made on behalf of the owners was a U.S. dollar account in New York. An agreement was reached under the terms of which the owners of the Despina R were to pay to the owners of the Eleftherotria 85 per cent. of the loss and damage suffered as a result of the collision. The expenses of repair had been incurred in various currencies. The question whether the damages were to be paid in sterling or some other currency was referred to the Admiralty Judge. Brandon, J. held that he had that he had jurisdiction to award damages in a foreign currency, but that he was bound by authority to award them in the currency of expenditure. The Court of Appeal, dismissing an appeal by the owners of the Despina R and allowing a cross appeal, held that there was jurisdiction to award damages in tort in sterling or in a foreign currency, and that, in the circumstances of the case, the appropriate currency was the plaintiffs' currency rather than the currency of the expenditure.

36. The second appeal was in respect of a cargo of onions shipped to Brazil by the French charterers of a Swedish-owned motor vessel, the Folias. The cargo arrived damaged, and the cargo receivers' claim for damages was settled by the charterers in Brazilian cruzeiros, which they purchased with French francs, their normal business currency. The hire under the charter-party was payable in U.S. dollars, and the proper law of the contract was English law. In arbitration proceedings the owners admitted their liability to the characters, but contended that payment should be made in cruzeiros. By then the value of the cruzeiro against the French francs was half what it had been when the characters had paid the cargo receivers. The arbitrators made their award in French francs. On a special case stated Robert Goff, J. held that the award should have been made in cruzeiros as being the currency of the loss. On appeal by the charterers the Court of Appeal restored the award of the arbitrators.

37. The owners of the Despina R as also the Swedish shipowners went in appeal to the House of Lords. Both the appeals were dismissed. The House held that in a claim based on tort, it was fairer to give judgment in the currency in which the loss was sustained than in the sterling equivalent at the date of the breach or loss; that the principles to be applied in ascertaining the currency of the

loss were those of restitutio in integrum and reasonable ability and, therefore, where a plaintiff proved that he conducted his business in a specific currency and it was reasonably foreseeable that he would use that currency to purchase the necessary currency to meet the immediate and direct expenditure caused by the defendant's tort, then judgment should be expressed in the plaintiff's currency and, accordingly, the Court of Appeal had properly varied the order from a judgment expressed in the currencies of expenditure to the currency of the business conducted on behalf of the owners of the Eleftherotria, namely, U.S. dollars. The following passage from the opinion of Lord Wilberforce (at pages 69-7) is instructive :

> ...I do not think that there can now be any doubt that, given the ability of an English court (and of arbitrators sitting in this country) to give judgment or make an award in a foreign currency, to give a judgment in the currency in which the loss was sustained produces a juster result than one which fixes the plaintiff with a sum in sterling taken at the date of the breach or of the loss.

It was further held that where the terms of a contract governed by English law did not expressly or by implication show that the parties had intended that payments arising from a breach of contract were to be paid in the currency of account or other named currency, the court should give judgment in the currency that best expressed the party's loss; that, although the appeal in the second case concerned a charter-party which expressly stated that certain contractual payments should be made in U.S. dollars, the terms of the charter-party did not show that payment for damage arising out of a breach of contract was to be made in that currency; that, arising from the owners' breach, the charters had used French francs to purchase the necessary cruzeiros to settle the receivers' claim and, in those circumstances, the Court of Appeal had correctly affirmed the arbitrators' decision that the currency that best expressed the charterers' loss was the currency of their business, namely, French francs. With respect to the arbitrators' jurisdiction to make an award in a foreign currency, Lord Wilberforce said (at pages 702-3) :

> In my opinion a decision in what currency the loss was borne or felt can be expressed as equivalent to finding which currency sum appropriately or justly reflects the recoverable loss. This is essentially a matter for arbitrators to determine. A rule that arbitrators may make their award in the currency best suited to achieve an appropriate and just result should be a flexible rule in which account must be taken of the circumstances in which the loss arose, in which the loss was converted into a money sum, and in which it was felt by the plaintiff. In some cases the 'immediate loss' currency may be appropriate, in others the currency in which it was borne by the plaintiff. There will be still others in which the appropriate currency is the currency of the contract. Awards of arbitrators based upon their appreciation of the circumstances in which the foreign currency came to be provided should not be set aside for, as such, they involve no error of law.

38. It will also be useful to refer at this stage to certain Practice Directions ((1976) 1 WLR 83 : (1976) 1 All ER 669) given, following upon the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)), with respect to claims and judgments in foreign currency and enforcement of such judgments. The Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)) was decided on November 5, 1975, and the Practice Directions in question were issued by the Senior Master of the Supreme Court of Judicature (Queen's Bench Division) on December 18, 1975, with the concurrence of the Chief Chancery Master acting on the authority of the Vice-Chancellor so far as they applied to the practice in the Chancery Division, and of the

Senior Registrar of the Family Division so far as they applied to the practice in that Division. As pointed out in Halsbury's Laws of England, Fourth Edn., Vol., 37, para 12, practice directions "provide directions as to matters of practice and procedure for the assistance and guidance of litigants in the conduct of their proceedings, and in administration of civil justice generally, and, although they lack the force of law they are of enormous value, to the courts, to practitioners and to all who are involved in the civil judicial process". Under the Practice Directions dated December 18, 1975, mentioned above, before a writ of summons is issued in which the plaintiff makes a claim for a debt or a liquidated demand expressed in a foreign currency, the writ must be endorsed with a certificate signed by or on behalf of the solicitor of the plaintiff or by the plaintiff, if he is acting in person, certifying the rate current in London for the purchase of the unit of the foreign currency claimed at the close of business on the date next or most nearly preceding the date of the issue of the of the writ and stating whether at that rate of exchange the debt of liquidated demand claimed in the writ amounts to "pounds ...or exceeds pounds 650 (as the case may be)". This certificate is required for the purpose of ascertaining the proper amount of the costs to be endorsed on the writ. The judgment which would be entered in respect of such a claim would show that it has been adjudged that the defendant do pay the plaintiff the sum in foreign currency for which the court has ordered judgment to be entered or its sterling equivalent at the time of payment. Where a defendant desires to pay into court a sum of money in satisfaction of the claim in foreign currency he may do so subject to the requirements of the Exchange Control Act, 1947. Where, however, a plaintiff desires to enforce a judgment expressed in a foreign currency by the issue of the writ of fieri facias, the praecipe for the issue of the writ must first be endorsed and signed by or on behalf of the solicitor of the plaintiff or by the plaintiff, if he is acting in person, with a certificate certifying the rate of exchange current London for the purpose of the unit of the foreign currency in which the judgment in expressed, at the close of the business on the date nearest or most nearly preceding the date of the issue of the writ and mentioning what the amount in pound sterling at that rate would be. The amount so certified will then be entered in the writ of fi. fa. A similar certificate is required where the plaintiff desires to enforce a judgment debt expressed in a foreign currency by adopting garnishee proceedings or other modes of execution.

39. The above survey shows the position in English law to be as follows :

> (1) Until recently the rule that was firmly established was that an English court could give judgment only in English currency and that for the purposes of litigation in England to recover a debt expressed in a foreign currency, such debt had to be converted into sterling with reference to the rate of exchange prevailing on the date when the debt was payable. This rule was affirmed by the House of Lords in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)).
>
> (2) The reason for this rule was that sterling was regarded as a stable currency and a constant unit of value; and that by taking the rate of exchange at the date of the breach, the creditor was being put into as good a position as if the debtor had done his duty and paid the debt on the due date.
>
> (3) After sterling ceased to be a stable currency and became subject to fluctuations in the international monetary market a new line of thinking began to emerge, particularly in commercial arbitrations where foreign currencies were involved, and the arbitrators in the City of London started making awards expressed in foreign currency.

(4) This new trend found judicial recognition in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) in which the Court of Appeal held that arbitrators in England had jurisdiction to make an award in a foreign currency in a case in which the money payable under a contract is payable in a foreign currency. The Court of Appeal further held that Section 26, now Section 26(1), of the English Arbitration Act, 1950, should be construed having regard to Section 36(1) of that Act, which deals with enforcement of foreign awards, and that the words "to the same effect" in the expression "an award...may...be enforced in the same manner as a judgment or order to the same effect" in Section 26(1) did not mean a judgment or order "in the same terms" but meant a judgment or order having "the same effect", and that this would be achieved if the sum awarded were converted into sterling at the rate of exchange prevailing on the date of the award, and that leave to enforce and award expressed in a foreign currency should be given by the court provided the applicant had filed an affidavit showing the rate of exchange as at the date of the award and giving the amount of the award converted into sterling.

(5) In the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)), the Court of Appeal took the date of the award as the date of conversion by reason of the interpretation placed by it upon the words "to the same effect" in Section 26(1) of the Arbitration Act, 1950, because an award could for the purpose of enforcement have the same effect as a judgment in an action on the award only if the date of the award were taken as the date of conversion as, by reason of the decision in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)), which was then the law, in such an action the date of conversion would have to be the due date of payment which, the debt being crystallized by the award, would be the date of the award, and the judgment, therefore, in such an action would have to be given on that basis.

(6) The development in law was carried yet one step further in the Schorsch Meier case ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)) where in an action for the price of goods, the plaintiff being member of the European Economic Community, the Court of Appeal held that the court could give judgment to the creditor in a foreign currency if that was the currency of the contract, that is to say, if the money of account and the money of payment is foreign currency. The court also held that the date of conversion should be the date of payment meaning thereby, as Lord Wilberforce pointed out in the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)) (at page 468), the date when the court authorize enforcement of the judgment in terms of sterling.

(7) The Schorsch Meier case ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)) was not decided purely upon Article 106 of the Treaty of Rome which by Section 2(1) of the European Communities Act, 1972, had been made part of the law of England, but it was also decided upon the general principle that the reasons for the rule in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) having ceased to exist, the court was at liberty to discard the rule itself. Thus, what the Schorsch Meier case ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)) decided was directly contrary to the decision of the House of Lords in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL))

(8) Both the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) and the Schorsch Meier case ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)) were decided without the other said being represented. From this it does not follow that the judgments delivered in those cases were not fully considered judgments. The leading judgment in each of these two cases was that of Lord Denning, M.R. who at the date when the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) was decided was a member of the House of Lords. In his concurring opinion in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) he had already expressed a doubt and posed a query whether the "breach date" rule should continue to be applied when sterling had lost the value it once had by reason of the devaluation of the pound.

(9) The question again fell for consideration by the House of Lords in the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)). In that case, the House of Lords departed from the rule in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)), namely, "the breach date conversion" rule and recognized that an English court could give judgment in a foreign currency in a case where under a contract the money was to be paid in that currency if the proper law of the contract was that of a foreign country and the money of account was of that country. So far as the date of conversion was concerned, all the Law Lords, except Lord Simon of Glaisdale, were of the opinion that it should be the date when the court authorizes the enforcement of the judgment in terms of sterling.

(10) Though the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) was not expressly overruled in the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)), in all the opinions delivered in that case except in the opinion of Lord Fraser of Tullybelton where no reference is made to that case, it was doubted whether in the future the rule in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) should or would hold the field. Lord Wilberforce opined that he saw no reason why, if desired, the practice adopted in that case should not be adjusted so as to enable conversion to be made at the date when leave to enforce the award in sterling is given. Lord Cross of Chelsea thought it absurd that there should be one rule for arbitrations with respect to debts expressed in a foreign currency and another rule with respect to actions on similar debts. Lord Edmund-Davies said that in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) the rate of exchange prevailing on the date of the award had to be adopted by the court because of the provisions of Section 26 and 36(1) of the English Arbitration Act and that but for such provisions the most just rate would be that prevailing when the award was being enforced. Even Lord Simon of Glaisdale in his dissenting opinion expressed the view that if Parliament were to reconsider the sterling judgment rule and the breach date rule, the rule in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) would come within the purview of such reconsideration.

(11) The principle laid down in the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)) was extended by the House of Lords in the case of The Despina R (1979 AC 685 : (1979) 1 All ER 421 (HL)) to actions in tort and for damages for breach of contract on the ground that it was fairer to give judgment in

the currency in which the loss was sustained than in its sterling equivalent at the date of the breach or loss, the principles to be applied in ascertaining the currency of the loss being those of restitutio in integrum and reasonable foreseeability of the plaintiff using a particular foreign currency to purchase the necessary currency to meet the immediate and direct expenditure caused by the defendant's tort or breach of contract. It was further held that in the case of arbitrations it was for the arbitrators to determine in what currency the loss was borne or felt and that the rule that arbitrators may make their award in the currency best suited to achieve an appropriate and just result should be flexible rule in which regard should be had to the circumstances in which the loss arose, in which the loss was converted into a money sum, and in which it was felt by the plaintiff.

(12) So far as practice and procedure is concerned, under the Practice Directions ((1976) 1 WLR 83 : (1976) 1 All ER 669) dated December 18, 1975, for the purpose of ascertaining the proper amount of the costs to be endorsed on the writ of summons the plaintiff's solicitor or the plaintiff, if he is acting in person, is to certify the rate of exchange current in London at the close of the business on the date next or most nearly preceding the date of the issue of the writ and to mention the sterling equivalent at that rate of the sum in foreign currency claimed in the action. The judgment is to be entered for the sum in foreign currency adjudged by the court to be payable by the defendant to the plaintiff or its sterling equivalent at the time of payment. Nonetheless if a judgment is to be enforced by execution, the application for execution is to state the rate of exchange current in London on the date nearest or most nearly preceding the date when the application is made.

40. We have spent some time in ascertaining the English law on the subject by reason of the absence of any authority of any Indian court on this point and because the learned Single Judge has based his decision on the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)) while the Division Bench of the Delhi High Court has based its on the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)). Further, the English decisions referred to by us are of courts of a country from which we have derived our jurisprudence and a large part of our laws and in which the judgments were delivered by Judges held in high repute. Undoubtedly, none of these decisions is binding upon this Court but they are authorities of high persuasive valued to which we may legitimately turn for assistance. Whether the rule laid down in any of these cases can be applied by our courts must, however, be judged in the context of our own laws an legal procedure and the practical realities of litigation in our country. When a foreigner has to receive a sum of money which should justly be payable to him in a foreign currency and, because of the default of the paying party, seeks to recover its payment through the court, the first question which arises is whether a court in India would have jurisdiction to pass a decree for a sum expressed in a foreign currency. Though on principle there is no reason why a court should not be able to do so, no court can pass a decree directing a defendant to do an impossible or an illegal act and in view of the provisions of our Foreign Exchange Regulation Act, 1973, and the restrictions contained therein on making payments in a foreign currency, if a decree were to be passed simpliciter for a sum expressed in a foreign currency, it would be to direct the defendant to do an act which would be in violation of the Foreign Exchange Regulation Act, 1973. Such a decree can, therefore, only be passed by making the payment in foreign currency subject to the permission of the foreign exchange authorities being granted. If, however, the authorities do not grant permission for payment of the judgment debt in foreign currency, it would not be possible for the defendant to make such payment, resulting in the decree becoming infructuous and the plaintiff getting nothing under it. The view of

Lawton, L.J. in the Schorsch Meier case ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)) that the plaintiff should be given judgment in the form in which he asked for it and must be left to extricate himself from the intricacies of the law relating to execution and exchange control does not commend itself to us for it does not appear to us to be conducive to the ends of justice. The court must, therefore, provide for the eventuality of the foreign exchange authorities not granting the requisite permission or even if such permission is given, the defendant not paying the decretal debt, or not wanting to discharge the decree by making payment in foreign currency or in Indian rupees. This can only be done by the decree providing in the alternative for payment of a sum of money in Indian rupees, which will be equivalent to the sum decreed in foreign currency. It is but just that a man, who is in law entitled to receive a sum of money in a foreign currency, should either receive it in such currency or should receive its equivalent in Indian rupees. It is here that the question of the date which the court should select for converting foreign currency into Indian rupees arises. The court must select a date which puts the plaintiff in the same position in which he would have been had the defendant discharged his obligation when he ought to have done, bearing in mind that the rate of exchange is not a constant factor but fluctuates, and very often violently fluctuates, from time to time. With these considerations in mind, we will now examine the feasibility of the several dates set out by us at the beginning of our discussion on this point.

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 this 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 converses 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.

42. The second of the dates mentioned above, namely, the date of the commencement of the action or suit, is equally subject to the same criticism. This date was rejected in the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)) because, according to Lord Wilberforce (at page 469), it placed "the creditor too severely at the mercy of the debtor's obstructive defences...or the law's delay". In that case Lord Fraser of Tullybelton pointed out (at page 502) that if the date of the commencement of the action "were to be taken for conversion, a period of a year or more might easily elapse, allowing for appeals, before payment was made". In our country, it is the misfortune of litigants that by reason of ever-increasing volume of litigation, overcrowded court dockets and undermanned courts, suits are often not disposed of for an unconscionably long time and if we take into account the time that would be spent in appeals, further appeals, and revision and review applications which may be filed, the longevity of the litigation is doubled, if not tripled, so that none can with any certainty predict even a probable date for its termination. The selection of the date of the filing of the suit would, therefore, leave the parties in as uncertain and precarious a position as the selection of the date when the amount became payable or the "breach date".

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.

44. Would the proper date of conversion then be the date when the court orders execution to issue ? This date appears to have found favour with all the Law Lords who decided the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)), except Lords Simon of Glaisdale. We, however, find the selection of this date equally beset with difficulties. Execution of a decree is not a simple matter. In execution of a money decree, first the judgment-debtor's property has to be attached. Pending attachment a third party, at times set up by the judgment-debtor, may prefer a claim to the attached property. Such claim will have to be investigated and determined by the executing court. Even where no claim is preferred, the attached property cannot be brought to sale immediately. A proclamation giving the prescribed particulars has to be first made. Even after such proclamation, the property cannot be put up for sale until after the expiry of the period prescribed by Order 21 Rule 68 of the Code of Civil Procedure, 1908 (V of 1908), unless it is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value. Even after the sale has taken place the judgment-debtor may further hold up the receipt of the sale proceeds by the decree-holder by raising objection to the conduct of the sale. Even otherwise, at times, a fresh auction sale may have to be held if the auction purchaser commits default in paying the balance of the purchase price. A considerable time would thus elapse between the date when the court orders execution to issue and the date of the receipt of the sale proceeds by the decree-holder. This passage of time would as much expose the decree-holders to the hazards of fluctuations in the rate of exchange as selection of any of the three dates we have discussed above. Yet another difficult in selecting the date when the court orders execution to issue is that at time the judgment debt is not recovered in full when the attached property is sold in execution. This necessitates a second application in execution for attaching other properties of the judgment-debtor and even the sale of these properties may not cover the deficit, thus necessitating yet another execution application. This would lead to a anomalous position for the court would have to fix the rate of exchange for the entire decretal debt at the time of granting the first application for execution and then, if the rate of exchange has varied in the mean time, to fix a different rate of exchange for the unrealized balance of the decretal amount at the time of granting the second application for execution, and equally so with respect to successive applications for execution. Thus, with respect to portions of the same decretal debt different rates of exchange would come to be fixed at different times.

45. A further difficulty in selecting the date of granting an execution application is that execution can only issue for a sum expressed in Indian currency. What is being executed is the decree and the sum for which execution is to issue in a money decree must, therefore, be for the particular sum specified in the decree, that is, the judgment debt. It cannot be for a sum which would be determined and fixed by the executing court at the time of granting the execution application, for under Order 21 Rule 11(2)(g) of the Code of Civil Procedure, 1908, an application for execution has to state "the amount with interest (if any) due upon the decree".

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)).

47. As regards the selection by the court of the date of payment as the proper date of conversion, that was the date taken in the Schorsch Meier case ((1975) 1 All ER 152 : 1975 QB 416 : (1974) 3 WLR 823 (CA)); but as Lord Wilberforce pointed out (at page 468) in the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)), this only means the date when the court authorizes enforcement of the judgment in terms of sterling. As we have seen, in England, according to the practice Directions ((1976) 1 WLR 83 : (1976) 1 All ER 669) dated December 18, 1975, the form of the judgment to be entered requires the defendant to pay the sterling equivalent of the foreign currency sum adjudged at the time of payment. This would be the most logical date and one which does justice to a plaintiff who has come to court to recover a sum of money payable to him in a foreign currency. If the principle to be applied is that the plaintiff should be put in the same position in which he would have been had the defendant discharged his obligation on the due date, then that principle is best served by the court taking the date of payment as the date of conversion. In adopting this date we, however, find ourselves faced with three practical and procedural difficulties, namely, payment of court-fees, the pecuniary limit of the jurisdiction of courts and execution.

48. So far as court-fees are concerned, we have a Central Act, namely, the Court-fees Act, 1870 (VII of 1870), which applies, either with or without amendments, to those States and Union Territories which have not repealed and replaced it by their own legislation. The State and Union Territories which have their own legislation on the subject are Andhra Pradesh, Gujarat, Himachal Pradesh, Jammu and Kashmir, Karnataka, Kerala, Maharashtra, Pondicherry, Rajasthan, Tamil Nadu and West Bengal. Under all Court-fees Acts, no plaint can be filed in any court without payment of court-fees. The plaintiff, therefore, has to value his claim in the suit and pay the court-fees thereon computed in the manner provided in the relevant Court-fees Act. So far as money suits are concerned, the court-fees payable are ad valorem court-fees according to the amount claimed which may or may not be subject to a ceiling depending upon which Court-fees Act applies. A suit for a sum of money expressed in a foreign currency is also a money suit and the plaintiff in such a suit will have to pay court-fees according to the amount claimed. As, however, a court in India cannot, as we have pointed out above, pass a decree simpliciter for payment of a sum in a foreign currency in such a suit, the plaintiff will have to make an alternative claim in his plaint for the rupee equivalent of the foreign currency sum claimed. He will, therefore, have to pay court-fees on the amount of the rupee equivalent. Such rupee equivalent as at the date of the institution of the suit can only be at the rate of exchange prevailing on that date. If, therefore, a plaintiff were to make at the alternative claim on the basis of the rupee equivalent at the time of payment, the value of the suit for the purposes of court-fees would be incapable of computation for it would not be possible to say that the rate of exchange on that date would be. It may be argued on the analogy of a suit for accounts or for partition or for administration or for winding up and accounts of a partnership that

the plaintiff can put a tentative valuation in his plaint computed according to the rate of exchange prevailing on the date of the institution of the suit and give an undertaking to pay the deficit court-fees if at the time of payment of the amount decreed, the rate of exchange has fluctuated in his favour so that the amount realized in rupee equivalent is more than the amount mentioned in the plaint. There is, however, a basic difference between a money suit and a suit for accounts, a partition suit, an administration suit or a partnership suit. In these types of suit, a preliminary decree is passed to ascertain the amount due to the plaintiff and when such amount is ascertained, final decree for the ascertained sum is passed. In a money suit, however, there can be only one decree. It is, therefore, neither permissible in law nor feasible for the plaintiff in a suit in which his claim is for a sum of money in a foreign currency to give an undertaking to make good the deficiecy in court-fees when he receives payment. In fact, a part or even the whole of the judgment debt may not be recovered at all. Even in the other types of suits mentioned above, it is not when the ascertained amount is received by the plaintiff that the deficit court-fees are to be paid by him. They are to be paid when the amount due to the plaintiff is ascertained. In the type of suits we are concerned with in these appeals, the plaintiff can at the highest give an undertaking to pay the deficit, if any, in the court-fees if at the time when the judgment is given and the decree passed, the rupee equivalent is more than at the date of the suit by reason of the fluctuation in the rate of exchange, but it would not be permissible for him to give such an undertaking for any date subsequent to the date of the passing of the decree. An additional difficulty would be that it is the court in which a suit is instituted which has to ensure at the time of the institution of the suit that the proper court-fees have been paid. The deficit court-fees, therefore, cannot be calculated and the balance thereof recovered by the executing court. These difficulties would rule out both the date when the court orders execution to issue and the date of payment of the decretal debt to be taken as the date of conversion.

49. These difficulties do not arise in England. Under the English law, the Lord Chancellor has power, with the consent of at least three Judges of the Supreme Court of Judicature and the concurrence of the Treasury, to fix fees to be taken in the High Court and the Court of Appeal (see Halsbury's Laws of England, Fourth, Edn. Vol. 10, para 908). In the exercise of this power, Supreme Court Fees Orders have been made from time to time. The order currently in force is the Supreme Court Fees Order, 1980 (S.I. 1980 No. 821), under which the fee payable in the case of a writ endorsed with a claim for a liquidated sum not exceeding pounds 2000 is pounds 35 and in any other case it is pounds 40, civil proceedings in England being commenced by issuing a writ. Thus, in England, a fixed court-fee is payable, the amount thereof varying dependent only upon whether it is an action for a liquidated sum not exceeding pounds 2000 or not. In England, therefore, as the court-fees payable are not ad valorem court-fees, in an action to recover a sum of money expressed in a foreign currency, it would be immaterial for the purpose of court-fees whether the plaintiff claims in the alternative the sterling equivalent of that amount as at the date of the judgment or as at the date when the court gives leave to enforce the judgment or as at the date of payment because in any of these cases, the court-fees payable by the plaintiff will not very except where by reason of the fluctuation in the rate of exchange the amount adjudged or the amount for which leave to enforce the judgment is given or the amount paid exceed pounds 2000 in a case where less than that has been claimed in the action. It should be noted that English practice also recognizes the difficulty which would be encountered in issuing execution for a sum in sterling to be determined at the date of payment or realization and accordingly the practice Directions ((1976) 1 WLR 83 : (1976) 1 All ER 669) dated December 18, 1975, require that where a plaintiff desire to enforce a judgment, he must mention in the application made for that purpose the sterling equivalent of the foreign currency sum adjudged calculated at the rate of exchange prevailing on the date nearest or most nearly proceeding the date of the application for execution, and the writ of execution would then

issue for such sterling equivalent.

50. So far as the limit pecuniary jurisdiction of courts in concerned, under Section 15 of the Code of Civil Procedure, 1908, every suit is to be instituted in the court of the lowest grade competent to try it. We have in India a large number of courts of various grades with different pecuniary limits of jurisdiction. In money suits, it is the amount claimed in the suit which will determine the particular court in which the suit is to be instituted. This determination cannot be done with reference to a foreign currency. It can only be done with refernce to Indian currency. This is an additional reason why the plaintiff must in his plaint give the rupee equivalent of the foreign currency sum claimed by him in the suit by converting it into Indian rupees at the rate of exchange prevailing at the date of the institution of the suit.

51. The difficulty with respect to execution which would arise if the court were to select the date of payment as the date of conversion is that execution must issue for a specific sum expressed in Indian currency "due upon the decree". It cannot issue for a sum which would become ascertainable only when realized or paid as would be the case were execution to issue for the rupee equivalent at the time of payment in rupees of a foreign currency sum. Further, as pointed out earlier, execution can issue only with respect to the amount due upon the decree.

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.

54. The learned Single Judge of the Delhi High Court also reached the same conclusion. He, however, did so relying upon the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)) under an erroneous belief that when in that case it was held that the proper date should be the date when the judgment becomes enforceable what was meant was the date when the judgment was given, that is, when the decree was passed. The learned Single Judge was in error in so reading the judgment of the House of Lords. When the majority in the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)) spoke of the date when the court gives leave to enforce the judgment, what they were referring to was not the date of the judgment but the date on which the court gives leave to execute the judgment. In Halsbury's Laws of England (Fourth Edn., Vol. 17, para 401) the word 'execution' is defined as follows :

The word 'execution' in its widest sense signifies the enforcement of or giving effect to the judgments or orders of courts of justice. In a narrower sense, it means the enforcement of those judgments or orders by a public officer under the writs of fieri facias, possession, delivery, sequestration, fieri facias de bonis ecclesiasticis, etc.

55. This definition also appeared in the Third Edition of Halsbury's Laws of England and was cited with approval by Hewson, J. in The Zafiro, John Carlbom & Co. Ltd. v. Owners of S.S. Zafiro (1960 P 1, 14 : (1959) 2 All ER 537, 544 : (1959) 3 WLR 123 (PDA)). The most usual method of enforcement of a money judgment in England is by writ of fieri facias, commonly called fi. fa. (see Halsbury's Laws of England, Fourth Edn., Vol. 17, para 462). In certain cases, a writ of execution to enforce a judgment of order cannot issue without leave of the court. It is unnecessary to go into the

details of the procedure relating to execution in England for what we have stated above is sufficient to show that what the majority in the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)) meant by the date when the court gives leave to enforce the judgment or the date when the court authorizes enforcement of the judgment was the date when the court gives leave to executed the judgment.

56. Does the fact that the decree sought to be executed is one passed in terms of an award which directs payment of a sum of money in a foreign currency make any difference to the date of conversion to be selected by the court ? According to the Division Bench of the Delhi High Court it does because, relying upon the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)), it held that in such a case the proper date for conversion of the foreign currency sum awarded would be the date of the award inasmuch as there was no difference between the relevant provisions of the English Arbitration Act, 1950 (14 Geo 6, c. 27), and our Arbitration Act, 1940 (X of 1940), particularly Section 26(1) the English Act and Section 17 of our Act. For reasons which we will presently set out, the Division Bench of the Delhi High Court erred in reaching this conclusion.

57. We have set out earlier the facts of the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) and have extracted the relevant passage from the judgment of Lord Denning, M.R. To recapitulate, in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)), the plaintiffs had been awarded a sum expressed in United States dollars in an arbitration held in London and had sought leave of the Court under Section 26, now Section 26(1), of the Arbitration Act, 1950, to enforce that award. In support of this application, the plaintiffs had filed an affidavit showing the rate of exchange as at the date of the award and the equivalent in pound sterling at that rate of the amount awarded to him and had claimed to enforce the amount awarded on that basis. Two questions, therefore, fell for the Court's determination. They were thus put by Roskill, L.J. in this judgment in that case (at page 504) :

The first is whether an arbitrator or umpire sitting in England or Wales can lawfully make an award in a currency other than sterling. The second is whether if such an award can be so lawfully made, it is enforceable under Section 26.

To understand the decision of the Court of Appeal so far as it concerns the first question, we must bear in mind the then prevailing state of the law in England and so far as it concerns the second question the provisions of the English law relating to enforcement of awards. At that time the old rule affirmed by the House of Lords in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) was the law. Under it an English court could give judgment only in English currency and in an action in England to recover a debt expressed in a foreign currency, such debt had to be converted into sterling at the rate of exchange prevailing on the date when the debt was payable. So far as the provisions of English law relating to enforcement of an award are concerned, the mode would depend upon whether or not it was a foreign award as defined in Section 35 of the Arbitration Act, 1950, which definition is mutates mutandis the same as the definition of "foreign award" given in Section 2 of our Arbitration (Protocol and Convention) Act, 1937 (VI of 1937). Sub-section (1) of Section 36 of the English Act provides of enforcement of foreign awards. That section is in the following terms :

36. Effect of foreign awards. - (1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable in England either by action or in the same manner as the award of an arbitrator is enforceable by virtue of Section 26 of this Act.

(2) Any foreign award which would be enforceable under this Part of this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in England, and any references in this Part of this Act to enforcing a foreign award shall be construed as including reference to relying on an award.

58. Though Section 36 is headed "Effect of Foreign Awards", it will be seen that sub-section (1) of that section deals with enforcement of foreign awards while only sub-section (2) deals with the effect of foreign awards. Thus, under Section 36(1) there are two alternative modes provided for enforcing a foreign award in England, namely, (1) by action at law on the award, and (2) by leave of the court in the same manner as the award of an arbitrator made in England is enforceable under Section 26. Since, according to the law then prevailing, an English court could only give judgment in sterling an required a debt expressed in a foreign currency to be converted into English currency at the rate of exchange prevailing on the date when the debt was payable, in an action on a foreign award the plaintiff would have to make his claim in English currency in respect of the sum of money awarded to him in a foreign currency. In such an action the debt in respect of which the plaintiff would be seeking judgment would be the sum of money payable to him under the award which had by virtue of the award become payable to him on the date of the award. He would, therefore, have to convert the foreign currency sum awarded to him into English currency at the rate of exchange prevailing on the date of the award.

59. Before we deal with the second mode of enforcing a foreign award provided in Section 36(1), it will be convenient to reproduce here the provisions of Section 26 of the English Arbitration Act which are as follows :

> 26. Enforcement of award. - (1) An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.
>
> (2) If -
>
> (a) the amount sought to be recovered does not exceed the current limit on jurisdiction in Section 40 of the Country Courts Act, 1959, and
>
> (b) a county court so orders,
>
> it shall be recoverable (by execution issued from the county court or otherwise) as if payable under an order of that court and shall not be enforceable under sub-section (1) above.
>
> (3) An application to the High Court under this section shall preclude an application to a county court and an application to a county court under this section shall preclude an application to the High Court.

Originally Section 26 consisted only of sub-section (1). Sub-sections (2) and (3) were inserted in Section 26 and the original section renumbered as sub-section (1) by Section 17(2) of the Administration of Justice Act, 1977. The new sub-sections (2) and (3) are immaterial for our purpose for it was the old Section 26, now Section 26(1), which formed the basis of the decision in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)).

60. Kerr, J., from whose judgment the appeal in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) was carried to the Court of Appeal, had before deciding the matter made enquiries of the Central Office of the High Court as to the practice in dealing with applications under Section 36(1). Roskill, L.J. in his judgment in the Court of Appeal has referred to this and has thus set out (at page 507) the information which Kerr, J. had received :

He was told that the practice on applications under that section is that the sum awarded in the foreign currency in question is converted into sterling at the rate prevailing at the date of the award and that, in the absence of any other objection, an order is then made giving leave to enforce the foreign award in the same manner as a judgment for that resulting sterling sum..

61. The award in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) was not a foreign award within the meaning of Section 35 of the English Act for it was made in England, though the sum awarded thereunder was expressed in a foreign currency, namely, United States dollars. In English law, an application enforce an award under Section 26(1) is only one of the modes of enforcing an award which is not a foreign award.

Where such an application is granted, it is not necessary that judgment must be entered in terms of the award. Lord Denning, M.R., in the course of his judgment in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)), pointed out (at page 502) that in most cases it would be unnecessary to enter judgment, for once leave was given, the award could be enforced by the ordinary means of execution, but it might be necessary to enter judgment in order to issue a bankruptcy notice and the latter words of Section 26 enabled judgment to be so entered. Roskill, L.J. also pointed out (at page 507) that under Section 26(1) there are two different steps which must be taken. First, the obtaining of leave to enforce the award in the same manner as a judgment, and secondly and independently, when leave is so given, the entering of judgment in the terms of the award.

62. Section 26(1) is not exhaustive of the modes in which an award, which is not a foreign award, can be enforced. Such an award can also be enforced by bringing an action on it in which case, as pointed out earlier, if the sum awarded were expressed in a foreign currency, the judgment would have to be sought in sterling for which purpose the rate exchange would be taken as at the date of the award. In the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) the Court held that an arbitrator or umpire in England had jurisdiction to make an award for a sum of money expressed in a foreign currency when that particular currency was the appropriate currency in which to express it. The difficulty which faced the Court was the manner of enforcing such an award by reason of the decision in the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) under which an English court could give judgment only in sterling. This difficulty was resolved by the Court by referring to Section 36(1) and holding that it would be unreasonable that an award in a foreign currency made abroad could be enforced by an application under Section 26(1) while the same award, if made in England, could not be so enforced. It was for this reason that the Court interpreted the words "to the same effect" occurring in Section 26(1) as meaning "having the same effect" and not as meaning 'in the same terms", because, as Lord Denning M.R. pointed out, if it were to be so interpreted, there would be some difficulty in applying the section to an award in a foreign currency but if the words were interpreted to mean that the judgment or order must have "the same effect", if would follow that if the sum awarded were converted into sterling at the rate of exchange as at the date of the award it would have the same effect as a judgment or order in an action on the award. We may point out that Cairns L.J. however, felt some doubt whether the sum awarded must be converted into sterling before leave to enforce

the award was given but he did not dissent because both Lord Denning, M.R. and Roskill, L.J. considered that it should be so converted. As emphasized by us earlier, in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) the date of the award was taken as the date of conversion because in an action on such an award the due date for payment of the debt would be the date of the award. We have seen that in the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)), though the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) was not expressly overruled, none of the Law Lords who had occasion to refer to it were happy with what had been held there; Lord Wilberforce opining that there was no reason why, if desired, the practice should not be adjusted so as to enable conversion to be made at the date when leave to enforce the aware in sterling is given; Lord Cross of Chelsea thinking it absurd that there should be one rule for arbitrations with respect to foreign currency debts and another with respect to actions on similar debts; Lord Edmund-Davies expressing his view that no basic distinction could be drawn for the purposes of a conversion date between the judgments and awards; and even Lord Simon of Glaisdale in his dissenting judgment stating his belief that if Parliament were to reconsider the sterling judgment rule and the breach date rule, the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) would come within the purview of such reconsideration. In view of these observations and the fact that the Havana case (1961 AC 1007 : (1960) 2 All ER 332 : (1960) 2 WLR 969 (HL)) is no longer the law in view of the decision in the Miliangos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)), it is highly doubtful whether today in England if the matter were carried higher, it would be decided in the same way. In view of the Milingos case (1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)), it cannot be said today that in an action on an aware the foreign currency any directed to be paid under the award must be converted at the date of the aware when it was payable. It would have to be converted at the date when the court gives leave to enforce the judgment. On principle there can be no difference between an action on an aware and a case where instead of filing an action the plaintiff files an application under Section 26(1) for leave to enforce the award. If in an action on the award the proper date of conversion would be the date when the court gives leave to enforce the judgment, where an application under Section 26(1) is filed the proper date of conversion should also be the same, for then alone can the award, when leave is given, "be enforced in the same manner as a judgment or order to the same effect."

63. We find that the Division Bench of the Delhi High Court has not correctly appreciated the ratio of the decision in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) nor the reasoning upon which that decision was based. We also find that the Division Bench of the Delhi High Court has committed an error in equating Section 26(1) of the English Arbitration Act with Section 17 of our Arbitration Act. The reason for the error is that the Division Bench of the Delhi High Court has proceeded upon a wrong assumption that the procedural scheme of the English Arbitration Act is the same as that of our Arbitration Act. In this connection, the Division Bench has referred to Section 22 of the English Act, under which the court has power from time to time to remit the matters referred or any of them for reconsideration of the arbitrator or umpire, and Section 23(1) of the English Act, under which the court has power to remove any arbitrator or umpire for misconduct. These sections correspond to Section 16 and 11 of our Act. We fail to see what relevance either of these sections had to the question in issue. Before we proceed further to discuss this aspect of the case, it will be convenient to set out Section 17 of our Arbitration Act, 1940. That section provides as follows :

> 17. Judgment in terms of award. - Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award

has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

64. What seems to have impressed the Division Bench of the Delhi High Court is the fact that in England the court is not bound to grant leave to enforce the award but can, when such an application is made, on objection being raised by the respondent, either remit the award or set it aside, and that the same can also be done by a court in India when an award has been filed in court. We find that in adopting this line of approach the Division Bench has overlooked the basic differences between the English procedure and the procedure under our Act. The provisions for enforcing an award under the English Act an under our Act are different. Under the English Act, if it is sought to enforce an award by making an application under Section 26(1), such application has to be made under Order 73 Rule 3 of the Rules of the Supreme Court, 1965, by an originating summons. There is no time-limit provided for taking out such a summons. There is, however, a time-limit provided for making an application to the court to remit an aware under Section 22 or to set aside an award under Section 23(2), under Order 73 Rule 5(1) of the Rules of the Supreme Court, 1965, the period of limitation being 21 days after the award has been made and published to the parties. An application for leave to enforce the award under Section 26(1) can, however, be made even before the expiry of the time for moving to set aside the award. In such a case, however, it can be resisted upon the ground that a motion to set aside the award is to be made. It is opined in Russel on Arbitration, Twentieth Edn., page 375, that in such a case, the party resisting the application would be required to show, upon affidavit, a substantial case for contesting the validity of the award, as well as to swear to his intention of doing so. Under Section 17 of our Act, an application for a judgment according to the award can only be made after the time for making an application to set aside the award has expired, or if such application has been made, only after it is refused. Under the English Act, the court is not bound to grant leave to enforce the award. In doubtful cases, it would ordinarily leave the party to pursue his remedy by filing an action on the award. The court may also give leave to enforce the award only upon terms. An instance of this is the case of E.D. & F. Man v. Societe Annonyme Tripolitaine Des Usines De Raffinage De Sucre ((1970) 2 Lloydr's L Rep 416) where the applicant, who had throughout admitted that he owed a certain sum on a cross-claim, which was not a subject-matter of the reference, was awarded a larger sum which made no reference to the cross-claim, was given leave to enforece the whole award as a Judgment on an undertaking given by him to accept the difference between the two sums in satisfaction of the award and the extinction of the cross-claim. Further, in answer to an application for leave under Section 26(1) the respondent may set up the defence that the award is a nullity, or is wholly or in part ultra vires, or is bad on the face of it. If, however, his objection to the award is that the arbitrator has misconducted himself, or that the award was improperly procured, his proper course would be to move to set the award aside, and, if necessary, to have the application enforce the award adjourned in the mean time (see Halsbury's Laws of England, Fourth Edn. Vol. 2, para 630). None of these contentions is available to a respondent where an application for a judgment according to the award is made under Section 17 of our Arbitration Act, 1940. They can only be raised by way of an application to set aside or remit the award after the award has been filed in court and notice thereof issued to the parties under Section 14 of the Arbitration Act, 1940. The period of limitation for such an application is prescribed by Article 119(b) of the Limitation Act, 1963 (XXXVI of 1963). If the period of limitation expires without any such application being made, the court, on application made to it for that purpose, must proceed to 'pronounce judgment according to the award" whereupon a decree has to follow. Section 17 expressly provides that in such a case "the

court shall... proceed to pronounce judgment according to the award and upon the Judgment so pronounced a decree shall follow". The only ground upon which such a decree can be challenged in appeal is that "it is in excess of, or not otherwise in accordance with the award". The court before which an application for judgment in terms of the award is made, has, therefore, no discretion in the matter except possibly in a case where the award is on the face of it patently illegal or violative of a provision of the law. Under Section 26(1) of the English Act, when leave is given to enforce the award, it is not necessary that judgment should be entered in terms of the award for the purpose of enforcing the award by execution. Under our Arbitration Act, before an award can be enforced, a judgment has to be pronounced according to the award, a decree has thereupon to follow and it is that decree which alone can be enforced by an application for execution made under Order 21, Rule 11 of the Code of Civil Procedure, 1908.

65. It is pertinent to note that the judgment, which the court pronounces under Section 17, is to be "according to the award". Where the award directs a certain sum of money to be paid and the court, in a case where it has not modified or corrected the award under Section 15, pronounces judgment for a different sum, the judgment cannot be said to be "according to the award". In the same way, where an award directs payment of a sum of money in a foreign currency and the court while pronouncing judgment provides for its rupee equivalent at the rate of exchange prevailing on the date of the award, the court will not be pronouncing judgment "according to the award" if in the mean time the rate of exchange has varied, because at the date of judgment the foreign currency equivalent of the amount in rupees provided in the judgment would be different from the foreign currency sum directed to be paid by the award. The judgment, therefore, can only be said to be "according to the award" if it directs payment of the rupee equivalent at the rate of exchange prevailing on the date of pronouncing the judgment which date is the same as the date of the passing of the decree. For this purpose, the applicant must satisfy the court, either on affidavit or otherwise, as to the rate of exchange prevailing on the date of the judgment or on the date nearest or most nearly preceding the date of the judgment.

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

67. On behalf of ONGC reliance was placed upon the decision of this Court, in Satish Kumar v. Surinder Kumar ((1969) 2 SCR 244 : AIR 1970 SC 833 : (1970) 1 SCJ 522). On the strength of this decision it was submitted that an award was not a mere waste paper until a decree in terms of the award has been passed but an award created rights and liabilities and, therefore, since the award in the instant case provided that a certain sum should be paid in a foreign currency to Forasol, it spoke from the date when it was made and published and the rate of conversion could, therefore, only be

the date of the said award. We are unable to see how the above decision in any way bears out this proposition or lends support to it. In that case, an award, made on a reference to arbitration by the parties without the intervention of the court, was filed in court under Section 14 of the Arbitration Act, 1940. In an application made under Section 30 to set aside the award, one of the objections taken was that the award required registration as it affected immovable property worth more than Rs 100 in value and as the award was not registered, it was not admissible in evidence. This contention was upheld. It was in this context that this Court observed (at page 249) that "an award has some legal force and is not a mere waste paper. If the award in question is not a mere waste paper but has some legal effect it plainly purports to or affects property within the meaning of Section 17(1)(b) of the Registration Act". The question before the Court in that case was whether a decree in terms of an unregistered award could be passed by the Court in a case where under the Registration Act, 1908 (XVI of 1908), the registration of the award was compulsory. This question is very different from the one which we are called upon to decide.

68. It was also submitted on behalf of ONGC that an award, unless it is set aside by the court, is a final adjudication of the rights and liabilities of the parties in respect of the matters referred to arbitration and, therefore, Forasol could not claim to covert the French franc part of the said award into Indian rupees at the rate of exchange prevailing on the date of the decree but can only do so at the rate of exchange prevailing on the date of the award. We find this submission wholly untenable. Undoubtedly, the said award, not having been set aside or modified by the Court, is final and binding on the parties and, in respect of the matters referred to arbitration, Forasol cannot claim any amount from ONGC other than that awarded by the umpire. Forasol is, however, not making any such claim. It is claiming only the sum in French francs which it has become entitled to receive from ONGC under the said award. All that Forasol wants is that ONGC should pay to it the sum of FF 5,89,727.51 due to it under the said award or its rupee equivalent as at the date when the Court pronounced judgment according to the said award and passed the decree in terms thereof. This is a very different thing from making a claim de hors the said award. The claim made by Forasol is actually one under the said award for if the sum awarded to it in French francs was not paid or could not be paid by ONGC, Forasol would be entitled to receive its rupee equivalent. On the decree being passed in terms of the said award the said award became merged in the said decree and the sum of FF 5,89,727.51 payable to Forasol under the said award became a judgment debt payable to Forasol under the said decree and, as pointed out above, at the time of passing the decree the Court, would have to direct payment of the rupee equivalent of this foreign currency debt only at the rate of exchange prevailing on the date of the decree.

69. For the reasons set out above, we are of the opinion that the rule in the Jugoslavenska case ((1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)) cannot be applied to this country and the fact that a decree is in terms of an award for a sum of money expressed in a foreign currency makes no difference to the date to be taken by the court for converting into Indian currency the foreign currency sum directed to be paid under the award and that such date should also be the date of the decree.

70. It would be convenient if we now set out the practice, which according to us, ought to be followed in suits in which a sum of money expressed in a foreign currency can legitimately be claimed by the plaintiff and decreed by the court. It is unnecessary for us to categorize the cases in which such a claim can be made and decreed. They have been sufficiently indicated in the English decisions referred to by us above. Such instances can, however, never be exhausted because the law cannot afford to be static but must constantly develop and progress as the society to which it applies, changes its complexion and old ideologies and concepts are discarded and replaces by new. Suffice

it to say that case with which we are concerned was one which fell in this category. In such a suit, the plaintiff, who has not received the amount due to him in a foreign currency, and, therefore, desires to seek the assistance of the court to recover that amount, has two courses open to him. He can either claim the amount due to him in Indian currency or in the foreign currency in which it was payable. If he chooses the first alternative, he can only sue for that amount as converted into Indian rupees and his prayer in the plaint can only be for a sum in Indian currency. For this purpose, the plaintiff would have to convert the foreign currency amount due to him into Indian rupees. He can do so either at the rate of exchange prevailing on the date when the amount became payable for he was entitled to receive the amount on that date or, at his option, at the rate of exchange prevailing on the date of the filing of the suit because that is the date on which he is seeking the assistance of the court for recovering the amount due to him. In either event, the valuation of the suit for the purposes of court-fees and the pecuniary limit of the jurisdiction of the court will be the amount in Indian currency claimed in the suit. The plaintiff may, however, choose the second course open to him and claim in foreign currency the amount due to him. In such a suit, the proper prayer for the plaintiff to make in his plaint would be for a decree that the defendant do pay to him the foreign currency sum claimed in the plaint subject to the permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973, being granted and that in the event of the foreign exchange authorities not granting the requisite permission or the defendant not wanting to make payment in foreign currency even though such permission has been granted or the defendant not making payment in foreign currency or in Indian rupees, whether such permission has been granted or not, the defendant do pay to the plaintiff the rupee equivalent of the foreign currency sum claimed at the rate of exchange prevailing on the date of the judgment. For the purposes of court-fees and jurisdiction the plaintiff should, however, value his claim in the suit by converting the foreign currency sum claimed by him into Indian ruppes at the rate of exchange prevailing on the date of the filing of the suit or the date nearest of most nearly preceding such date, stating in his plaint what such rate of exchange is. He should further give an undertaking in the plaint that he would make good the deficiency in the court-fees, if any, if at the date of the judgment, at the rate of exchange then prevailing, the rupee equivalent of the foreign currency sum decreed is higher than that mentioned in the plaint for the purposes of court-fees and jurisdiction. At the hearing of such a suit, before passing the decree, the court should call upon the plaintiff to prove the rate of exchange prevailing on the date of the judgment or on the date nearest or most nearly preceding the date of the judgment. If necessary, after delivering judgment on all other issues, the court may stand over the rest of the judgment and the passing of the decree and adjourn the matter to enable the plaintiff to prove such rate of exchange. The decree to be passed by the court should be one which orders the defendant to pay to the plaintiff the foreign currency sum adjudged by the court subject to the requisite permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973, being granted, and in the event of the foreign exchange authorities not granting the requisite permission or the defendant not wanting to make payment in foreign currency even though such permission has been granted or the defendant not making payment in foreign currency or in India rupees, whether such permission has been granted or not, the equivalent of such foreign currency sum converted into Indian rupees at the rate of exchange proved before the court as aforesaid. In the event of the decree being challenged in appeal or other proceedings and such appeal or other proceedings being decided in whole or in part in favour of the plaintiff, the appellate court or the court hearing the application in the other proceedings challenging the decree should follow the same procedure as the trial court for the purpose of ascertaining the rate of exchange prevailing on the date of its appellate decree or of its order on such application or on the date nearest or most nearly preceding the date of such decree or order. If such rate of exchange is different from the rate in the decree which has been challenged, the court should make the necessary modification with respect to

the rate of exchange by its appellate decree or final order. In all such cases, execution can only issue for the rupee equivalent specified in the decree, appellate decree or final order, as the case may be. These questions, of course, would not arise if pending appeal or other proceedings adopted by the defendant the decree has been executed or the money thereunder received by the plaintiff.

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

72. In the case of the said award which had led to these appeals before us, the party entitled to receive the money - Forasol - was a foreign party. Under the said contract, the currency of account was a foreign currency and so was the currency of payment except for a portion thereof. Forasol was, therefore, entitled, on payment not being made to it by ONGC, to receive in French francs the amounts which because payable to it in that currency. The umpire was, therefore, justified in providing that the amounts payable under the said award to Forasol in French francs should be paid in French currency. The umpire has, however, neither provided that such payment would be subject to the permission of the foreign exchange authorities being obtained nor specified the conversion rate to be applied in the eventualities which we have set out above. That, however, does not make any difference because neither party has objected to the said award on this ground. On the contrary, both parties have accepted the said award as binding and conclusive. As mentioned above, this omission on the part of the umpire could have been corrected by the Delhi High Court when it came to pronounce judgment according to the said award and pass the said decree in terms thereof. The decree passed in terms of the said award, however, does not specify either the rupee equivalent of the amount in French francs payable to Forasol or the rate of exchange at which the conversion of such amount into Indian rupees should be made. To that extent, the decree passed in terms of the said award by the Delhi High Court was not a proper decree. Both the parties have, however, accepted the said decree and have not challenged it on this ground in any proceedings. In any event, the aforesaid mistake in the said decree was one which could have been got corrected by an application for review or by an application under Section 152 or, in any event under Section 151, of the Code of Civil Procedure, 1908. The decree has now become final and binding upon the parties. Both the parties have accepted the said decree and the said decree cannot, therefore, be said to be

invalid on the ground of the above omission to specify either the rupee equivalent of the French franc portion of the said award or the rate of exchange at which such French franc portion was to be converted into rupee equivalent.

73. For the reasons set out above, we hold that the learned Single Judge rightly took the date of the decree as the date of conversion. In his order on the said execution application he has, however, given a direction that ONGC could satisfy the judgment debt by making payment in French francs or if they so preferred, by paying the equivalent sum in rupees at the rate of exchange prevailing on the date of the decree. He was in error in not qualifying this direction by making the option given to ONGC to make payment in French francs subject to the permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973. To this extent, the order passed by the learned Single Judge requires to be modified.

74. Turning now to the appeal filed by ONGC, it was stated in the special leave petition filed by ONGC that it had two claims against Forasol, the first with respect to what was termed as "tax differential" and the second with respect to interest on the amounts payable by Forasol to ONGC. Both these claims were negatived by the learned Single Judge. It was expressly stated in paragraph 19 of the special leave petition of ONGC that except for the aforesaid two claims, the Judgment and order of the Division Bench of the Delhi High Court should be affirmed.

75. ONGC's claim for tax differential was based on Article IV-1. 2 of the said contract under which Forasol was to pay income-tax, surcharge on income-tax and all other taxes which might be assessed and levied by the income-tax authorities in Indian on the income of Forasol under the said contract as well as on the income of Forasol's personnel from the work performed by them under the said contract. Under the proviso to the said article, if subsequent to the date of the said contract, the tax rates in India were changed so as to be higher than what they were at the date of the signing of the said contract, ONGC was to pay the difference to Forasol and if the tax rates became lower, Forasol was to pay the difference to ONGC. This proviso was not to be applicable in respect of the taxes payable by Forasol on the income of its personnel. The learned Single Judge has pointed out in his judgment that the claim in respect of tax differential did not survive inasmuch as by the said award the amounts paid by ONGC as tax on behalf of Forasol were adjusted and given credit for. ONGC did not challenge this finding in the appeal filed by it in the Delhi High Court. Nonetheless ONGC sought to reagitate this point in its special leave petition. At the hearing of this appeal, learned counsel for ONGC stated that he was not pressing this point. In the written submission filed on behalf of ONGC after the hearing of both these appeals was concluded. ONGC has, however, once again sought to raise this point. The point not having been urged in the intra-court appeal in the Delhi High Court and also having been given up at the hearing of these appeals before this Court, ONGC cannot be permitted subsequently to agitate this point in the written submissions filed on its behalf. In any event, in our opinion, the learned Single Judge was right in rejecting this claim of ONGC.

76. So far as ONGC's claim for interest is concerned, it has been negatived both by the learned Single Judge and the Division Bench of the Delhi High Court. We find no substance in this claim. The relevant provision of the said award which deals with payment of interest is as follows :

Under the contract there is no right to interest to either party except on French francs. If the amount paid by ONGC to the credit of Forasol in regard to income-tax and the several items of allowance and disallowance under this award are worked out and it is found that there is an amount payable to ONGC in French francs that would carry interest, but if the amount is in rupee then no interest

could be allowed until the date of the award.

The amounts on which interest is claimed by ONGC were payable by Forasol in rupees and not in French francs. Therefore, by the express terms of the said award, there is no right in ONGC to claim any interest on these amounts and this claim of interest was rightly negatived.

77. In the result, we allow Civil Appeal No. 628 of 1981 filed by Forasol and set aside the order passed by the Division Bench of the Delhi High Court in the appeal filed by the Oil and Natural Gas Commission, namely, E.F.A. (O.S.) 5 of 1977 and we restore and confirm the order passed and directions given by the learned Single Judge of the Delhi High Court in the execution application filed by Forasol, namely, Execution No. 77 of 1976, with this modification that if the Oil and Natural Gas Commission wants to pay in French francs the amount due by it under the said decree, if will be at liberty to do so after obtaining the requisite permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973.

78. We dismiss Civil Appeal No. 629 of 1981 filed by the Oil and Natural Gas Commission.

79. The Oil and Natural Gas Commission will pay to Forasol the costs of both the appeals in this Court as also of the appeal E.F.A. (O.S.) 5 of 1977 in the Delhi High Court.

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