Jet Airways (India) Limited. ...First vs Sahara Airlines Limited & Ors. ... on 4 May, 2011

Author: D.Y.Chandrachud

Bench: D.Y.Chandrachud

VBC 1 exe.appln161.09

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

EXECUTION APPLICATION NO.161 OF 2009

WITH
CHAMBER SUMMONS NOS.551/09, 729/09, 603/10 & 477/11
AND
NOTICE NO.734 OF 2009

IN
ARBITRATION AWARD DATED 12 APRIL 2007

Jet Airways (India) Limited. ...First Claimant/
ig Judgment Debtor.
Vs.
Sahara Airlines Limited & Ors. ...Second Claimants.
....

Mr.Harish Salve, Senior Advocate with Mr.Janak Dwarkadas, Senior Counsel, with Mr.Zal Andhyarujina, Ms.Chetna Rai, Mr.R.J.Gagrat, Mr.Suman Khaitan, Ms.Sheetal D.Sabnis, Mr.Mohan Salian, Mr.G.T.Mestha, Ms.Ipsita Sen and Ms.Neha

Mirajgaokar i/b. Gagrats for the First Claimant/ Judgment Debtor.
Mr.Fali Nariman, Senior Advocate with Mr.Percy J.Pardiwala,

Senior Advocate, Mr.Pradeep Sancheti, Senior Advocate, Mr.Satish Kishanchandani, Mr.Jatin Pore, Ms.Neha Shah and Ms.Tanu Banerji i/b. DSK Legal for the Second Claimant Nos.2 to 8.

.....
CORAM : DR.D.Y.CHANDRACHUD, J.

May 4, 2011.

JUDGMENT :

1. The proceedings arise in execution of a consent award of 12 April 2007 of an Arbitral Tribunal.

I Facts

2. On 18 January 2006, a Share Purchase Agreement (SPA) was entered into between Sahara India Commercial Corporation and six others, ("the selling shareholders"), Jet Airways (India) Limited ("Jet") as purchaser and Sahara Airlines Limited. By an amendment agreement dated 29 March 2006, time to fulfill certain conditions precedent was extended upto 21 June 2006.

3. The salient features of the agreement were as follows:

> (i) Subject to the provisions of the SPA, including the disclosed liabilities on the closing date, the selling shareholders shall sell, transfer and deliver to the purchaser and Sahara Airlines Limited shall accept from the vendors, free from all

encumbrances, all the rights, title and interest of the vendors in the 'sale shares'.

The sale shares were the existing equity and preference shares, representing the entire issued and paid up share capital of Sahara Airlines Limited (Clause 2.1);

(ii) The obligation of the purchaser to acquire the shares was

conditional upon the fulfillment of certain conditions mentioned in clause 3. Parties agreed to exercise all reasonable endeavours to ensure satisfaction of the conditions precedent not later than sixty five days from the effective date (18 January 2006) i.e. by 23 March 2006 (Clause 4.2);

(iii) The gross total consideration was Rs.2,000/- crores together with interest accrued until the closing date (Clause 5.1);

(iv) The total consideration was to be deposited by the purchaser simultaneously with the execution of the SPA with an escrow agent (Clause 5.4);

(v) Since the conditions precedent were not fulfilled within sixty five days of the effective date, time was extended by ninety days by the amended agreement of 29 March 2006; and

(vi) An amount of Rs.500 crores out of the total consideration of Rs.2,000/- crores deposited by Jet with the escrow agent was released by consent to Sahara against a personal VBC 4 exe.appln161.09 guarantee.

4. According to Jet, the SPA came to an end as a result of the non-fulfillment of the conditions precedent upon which it addressed a letter dated 19 June 2006.

5. Several proceedings were initiated in Court. One of the selling shareholders moved the District Court at Lucknow under Section 9 of the Arbitration and Conciliation Act, 1996 for an injunction restraining the escrow agent from releasing and Jet seeking the release of the consideration of Rs.1,500/- crores. Other selling shareholders also filed an Arbitration Petition at Lucknow.

Jet filed an Arbitration Petition under Section 9 in this Court for injunctive relief. On a transfer petition by Jet, on 28 August 2006, the Supreme Court transferred the Arbitration Petitions filed at Lucknow to this Court. Jet, in the meantime, instituted a Summary Suit in this Court for the

recovery of an amount of Rs.500/- crores based on a personal guarantee executed by Shri Subrata Roy Sahara. This Court passed an order on 22 September 2006 on Jet's application by consent, permitting Jet to withdraw an amount of VBC 5 exe.appln161.09 Rs.500/- crores from the escrow account upon furnishing a Bank Guarantee for the amount.

6. Arbitral proceedings took place before an arbitral Tribunal consisting of Lord Steyn as Presiding Arbitrator, Mr.Justice S.P.Bharucha, former Chief Justice of India and Mr.Justice B.P.Jeevan Reddy, former Judge of the Supreme Court. On 12 April 2007, Consent Terms were filed before the arbitral tribunal.

The consideration for the purchase of the shares of Sahara Airlines Limited was reduced from Rs.2,000/- crores to Rs.1,450/- crores.

Under the Consent Terms, Jet was liable to pay four annual instalments each of Rs.137.50 crores, "without any deduction and set off" on or before 30 March 2008, 30 March 2009, 30 March 2010 and 30 March 2011, time being of the essence. In the event of any default by Jet in the payment of the instalments, the concession was to stand "automatically withdrawn" and the consideration would stand restored from Rs.1,450/- crores to Rs.

2,000/- crores. In that event, the Consent Terms stipulated that Jet will become liable to pay and "do pay" to the selling shareholders the price originally agreed of Rs.2,000/- crores.

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7. The arbitral tribunal passed a consent award on 12 April 2007, recording that under the Consent Terms parties had managed to resolve all the disputes existing between them and all the issues that arose in the arbitration. Accordingly, (i) All claims and counter claims were withdrawn; and (ii) An award was passed in terms of the Consent Terms. On 20 April 2007, the Consent Terms were implemented. All shares were transferred and management came from Sahara to Jet.

8. For Assessment Year 2004-05, a notice of demand was issued on 23 August 2007 by the Income tax authorities under Section 156 of the Income Tax Act, 1961 for a sum of Rs.444.5 crores. (This assessment has subsequently been annulled by the order of the Commissioner of Income Tax (Appeals) on 17 June 2009). On 26 March 2008, a letter was addressed by Jet to Sahara stating that the Chief Commissioner of Income Tax had agreed to keep the demand for Assessment Year 2004-05 in abeyance subject to certain conditions stipulated in a letter dated 5 March 2008. By his letter of 5 March 2008, the Chief Commissioner of Income Tax VBC 7 exe.appln161.09 had directed that an amount of Rs.107.08 crores should be paid in three instalments of Rs.37.08 crores, Rs.35 crores and Rs.35 crores by 20 March 2008, 15 April 2008 and 15 May 2008 respectively.

The balance of the demand was held in abeyance. Jet by a letter dated 26 March 2008, informed Sahara that it had paid an amount of Rs.37.08 crores on 24 March 2008, and that :

> "Tax dues for the past are the liability of the selling shareholders in their entirety as stipulated in the aforesaid SPA and we are entitled to be reimbursed forthwith to the extent of the said amount paid by us on your behalf".

By its letter, Jet while acknowledging that under the Consent Terms and the consent award, the first instalment of Rs.137.5 crores was payable by it to the selling shareholders on or before 30 March 2008 intimated Sahara that in the event that reimbursement for the amount of Rs.37.08 crores is not received by that date, Jet would be adjusting Rs.37.08 crores paid to the Income Tax authorities.

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9. By a letter dated 28 March 2008, Sahara in its response stated that under the consent award, Jet was required to pay the amount payable without any deduction or set off. According to Sahara, (i) Since the income tax liability did not exceed the threshold of Rs.50 crores (laid down in the SPA), the selling shareholders were not liable to indemnify Jet Lite; and (ii) The sum of Rs.37.08 crores could not be adjusted from the amount payable under the Consent Award. Accordingly, Jet was requested to remit the first instalment of Rs.137.5 crores in full under the Consent Award. On 29 March 2008, Jet addressed a reply to Sahara, requesting the latter "to reimburse the said sum of Rs.

37.08 crores immediately so as to obviate any adjustment from the annual instalment payable under the Consent Terms." On 29 March 2008, Sahara by its response reiterated that the award did not authorise Jet to make any deductions or adjustments from the monies payable by it to the selling shareholders; that the award required Jet to make the payment without any deduction or set off and hence, the entire amount would have to be paid in full.

10. By a letter dated 31 March 2008 written to Sahara, Jet VBC 9 exe.appln161.09 asserted that since Sahara had wrongfully denied its liability to indemnify Jet under the SPA with respect to the income tax liability, Jet was constrained to adjust a sum of Rs.37.08 crores (already paid by Jet to the Income Tax Department on behalf of Sahara) from the first annual instalment. Jet stated that it would be remitting a sum of Rs.100.42 crores towards the first annual instalment in accordance with the Consent Terms and award. An amount of Rs.100.42 crores was credited to the account of Sahara by Jet by an electronic transfer of funds on 31 March 2008 (30 March 2008 being a Sunday).

By a further letter dated 2 April 2008, Jet asserted thus :

> "We would like to point out that we were entitled to withhold the entire amount of the income tax assessed, since we have not received any security against a potential liability in excess of Rs.300 crores. However, as a gesture, we have withheld only a sum of Rs.37.08 crores from this instalment, in the expectation that you will make suitable arrangements for the balance liability forthwith."

Sahara submitted a denial by its response dated 8 April 2008.

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11. On 22 July 2008 an order of assessment was passed by the Income Tax authorities for Assessment Year 2005-06. A notice of demand was issued to Jet Lite (India) Limited for a sum of Rs.

520.63 crores. According to Sahara, the demand notice was annexed by Jet to Chamber Summons 685 of 2009, but no notice of demand (under Clause 16.3 of the SPA) was sent to Sahara.

According to Sahara, it has asserted in paragraph 10 of its affidavit in reply dated 29 April 2009 in the Chamber Summons that no claim or demand was made by Jet since an appeal had been filed and in view of a letter dated 23 February 2009 stating that the Income Tax authorities had agreed not to treat Jet as an assessee in default. According to Sahara, paragraph 22 of Jet's rejoinder dated 5 May 2009 does not specifically deny the letter of the Income Tax authorities dated 23 February 2009. On 15 January 2009, a notice of demand was issued by the Assessing Officer to Jet Lite raising a demand of outstanding dues of Rs.1,135/- crores for Assessment Years 2001-02 to 2005-06. On 6 April 2009, Jet made a demand upon Sahara of a sum of Rs.1,135/- crores.

12. On 26 March 2009, Execution Application 161 of 2009 VBC 11 exe.appln161.09 was filed by Sahara for the execution of the decree in the amount of Rs.999.58 crores on the footing that the original purchase price of the shares stood restored. On 30 March 2009, a warrant of attachment was issued for the attachment of movable assets by Jet Airways. On 30 March 2009, Jet addressed a letter to Sahara recording that it had "received a huge demand towards income tax payable for the period prior to its take over by Jet Airways" and that pending a final adjudication of the tax payable, an amount of Rs.50 crores had been deposited with the tax authorities in deference to the demand. Jet stated that it had adjusted the aforesaid sum of Rs.50 crores against the second annual instalment of Rs.137.5 crores payable to Sahara under the SPA read with award and the balance of Rs.87.5 crores had been remitted.

13. On 31 March 2009, a Learned Single Judge of this Court, Mr.Justice S.C.Dharmadhikari, directed that without prejudice to the rights and contentions of the parties and on Jet furnishing an undertaking that it would not create any further encumbrance, alienate or transfer its movable and immovable assets and properties, the warrant of attachment dated 30 March 2009 would VBC 12 exe.appln161.09 not be executed until the disposal of the Chamber Summons. The attachment made until the date of the order was to remain unaffected.

II The proceedings before the Court :

14. (1) Execution Application 161 of 2009 has been filed by

Sahara for the payment of a decretal amount of Rs.999.58 crores.

This comprises of the original price of Rs.2000/- crores, less the following amounts paid by Jet to Sahara:

> (i) Rs.500/- crores which was paid on 29 March 2006, when an extension of time for the completion of conditions precedent under the SPA was agreed upon;
>
> (ii) Rs.400/- crores paid upon the delivery of all shares of Sahara Airlines Limited on 20 April 2007 pursuant to the Consent Terms dated 12 April 2007; and
>
> (iii) Rs.100.42 crores (i.e. Rs.137.50 crores, less Rs.37.08 crores) paid by Jet on 30 March 2008 as payment against the first instalment. The mode in which the assistance of the Court is required, is by issuing a warrant of attachment of movable VBC 13 exe.appln161.09 properties under Order 21 Rule 43 of the Code of Civil Procedure, 1908 against Jet and thereafter, by the issuance of a warrant of sale under Order 21 Rule 64;
>
> (2) Jet has taken out Chamber Summons 551 of 2009 in Execution Application 161 of 2009 on 31 March 2009, praying that:
>
> (i) Jet "were and are entitled to deduct and/or set off all undisclosed income tax liabilities incurred and/or suffered by Sahara Airlines Limited, after the consent award being passed on 12 April 2007";

(ii) That Jet has "not committed any default, nor (has it) failed to pay instalment No.1 of Clause 3(c) of the Consent Terms by deducting and/or setting off from the instalment of Rs.137.5 crores payable on or before March 31, 2008 .. a sum of Rs.37.08 crores deducted and paid to the Income Tax Department 'for and on behalf of' Sahara Airlines Limited";

(iii) That the concession in the sum of Rs.550/- crores from the originally agreed price of Rs.2,000/- crores does not stand VBC 14 exe.appln161.09 withdrawn; and

(iv) That Sahara has not become entitled to execute the award for the recovery of the sum claimed by it in Execution Application 161 of 2009;

(3) Execution Application 180 of 2009 filed by Jet on 23 April 2009 for the recovery of an amount of Rs.821/- crores. This amount is computed on the basis of a demand of Rs.103.24 crores made by the Income Tax authorities in the Assessment Order for Assessment Years 2002-03, 2004-05 and 2005-06. Out of this demand, an amount of Rs.908/- crores is claimed to represent undisclosed liability. After giving due credit for the amount of Rs.

87.08 lakhs deducted from the instalment due and paid to Sahara, a net claim of Rs.821/- crores has been made by Jet upon Sahara;

(As recorded later, Execution Application 180 of 2009 was withdrawn by Jet on terms set out in an order of this Court).

(4) Chamber Summons 685 of 2009 filed on 23 April 2009 by Jet in Jet's Execution Application 180 of 2009, seeking relief to the effect that there has been no failure on the part of Jet to pay VBC 15 exe.appln161.09 the instalment on the due date and for a direction to Sahara to forthwith pay/reimburse to Jet an amount of Rs.821/- crores, being the tax liability incurred/suffered in respect of Assessment Years 2004-05 and 2005-06;

(5) Chamber Summons 729 of 2009 filed by Jet on 29 April 2009 in Execution Application 161 of 2009 for satisfaction being recorded on the decree under Order 21 Rule 2(1) of the payment of Rs.87.50 crores (the second instalment) to Sahara on 30 March 2009 and Rs.50/- crores to the Income Tax Department as adjustment of the second instalment under the consent award of 12 April 2007;

(6) Chamber Summons 603 of 2010 taken out by Jet on 19 March 2010 in Execution Application 161 of 2009 to the effect that this Court should release and discharge Jet of the undertaking given on 2 April 2009 not to create further encumbrance on, alienate or transfer its movable and immovable assets and properties as a condition for not executing the warrant of attachment levied by Sahara on 30 March 2009;

VBC 16 exe.appln161.0

-(7) During the pendency of the proceedings, Jet has also

taken out Chamber Summons 477 of 2011 for permission to enter into a development agreement with Godrej Properties Limited in pursuance of an MoU dated 26 May 2010.

III Submissions:

15. The parties have filed extensive written submissions. In the interests of brevity, a detailed narration of those submissions is not made at this stage. The arguments urged at the Bar and in the submissions would be addressed during the course of the judgment. Sahara's case has been summarized in its submissions as follows :

SAHARA's submissions :

1. Clause 15.1.1A and Clause 16 of the SPA have not been made a part of the consent terms. Hence the Award in terms of the consent terms would not include any decretal obligation to reimburse all income tax liabilities incurred or suffered in VBC 17 exe.appln161.09 excess of Rs.50 Crores arising out of transactions or events before 18 January 2006, the effective date. Clause 15.1.1A and clause 16 form a part of the SPA and not the consent terms and there is no award for reimbursement of past income tax liabilities;

2. Under the SPA Jet had no right to direct the Escrow Agent not to pay over any part of the purchase price lying with it to Sahara so as to ensure the fulfilment of Sahara's indemnity obligation under clause 15.1.1A read with clause 16 of the SPA. On closing, Sahara was entitled to receive from the Escrow Agent the full amount of Rs.1500 Crores (Rs.2000 Crores less Rs.500 Crores released on 29 March 2006) even though the assessments for A.Ys. 2003-04, 2004-05, 2005-06 and 2006-07 had not been completed and though there was a possibility of tax liabilities, which were not disclosed tax liabilities arising as a result of assessment orders that may be passed in future;

3. The consent terms do not make any alteration of this VBC 18 exe.appln161.09 position. They provide for a concession in the purchase price from Rs.2000 Crores to Rs.1450 Crores and provide for the payment of a balance of Rs.550 Crores of the concessional purchase price in four annual instalments if paid in time.

Time was of the essence. If the instalments were not paid in time, the concession agreed to would stand automatically withdrawn and the consideration would stand automatically restored to Rs.2000 Crores which would become payable forthwith and the decree for Rs.2000 Crores would become executable forthwith;

4. The only additional right which Jet did not possess under the SPA, which is granted under the consent terms is that notwithstanding that the additional sum of Rs.550 Crores becomes due and payable forthwith and the Award would become executable forthwith, Jet would be liable to pay the additional sum of Rs.550 Crores only if Sahara had performed its indemnity obligations under clause 15.1.1A read with clause 16 of the SPA at the time when the amount of Rs.550 Crores had become due and payable;

VBC 19 exe.appln161.09

5. This additional right conferred on Jet by the second paragraph of clause 5 of the consent terms is not made applicable to clause 3. Hence the right of Sahara to receive Rs.1450 Crores is not linked to the fulfillment of Sahara's indemnity obligation under clause 16 read with clause 15.1.1A of the SPA. The reciprocity of obligations relied upon by Jet is limited only to the payment of the additional sum of Rs.550 Crores and not the sum of Rs.1450 Crores;

6. Since the right of Jet to withhold payment of the additional sum of Rs.550 Crores arises only as a consequence of a default on the part of Jet to pay the instalments as stated in clause 3(c) of the consent terms, Jet's right to hold back the payment of Rs.550 Crores has to be confined only to the performance by Sahara of its indemnity obligations on the date of default. Jet cannot withhold the sum of Rs.550 Crores till the liabilities for assessment years 2003-04, 2004-05, 2005-06 and part of 2006-07 (upto 18 January 2006) have been finally determined. The consent terms do VBC 20 exe.appln161.09 not give Jet a right to retain the additional sum of Rs.550 Crores until all assessment proceedings, noted earlier, have become final.

Submissions of Jet

16. Jet has urged that: (i) The Consent Terms and the Consent award involve reciprocal obligations. The Consent award is not a money decree simpliciter, but is a decree in terms of the Consent Terms involving mutual obligations;

-(ii) Reciprocal obligations are capable of execution;

-(iii) Clauses 15.1.1A and 16 of the SPA embody a warranty and an indemnity in a contract for the acquisition of an enterprise.

The enterprise value was determined on the basis of the tax liability being within the normal anticipated assessment pattern;

-(iv) The warranty in Clause 15.1.1A is in respect of liabilities incurred or suffered. Liability to pay tax is fundamentally different from the notion of payment of tax. Tax liability is incurred at various stages: (a) theoretically when a taxable event occurs; (b) VBC 21 exe.appln161.09 when an order of assessment is made, which crystalises the liability; and (c) when a notice of demand is served under Section 156 of the Income Tax Act, 1961. Contextually construed, the expression 'reimbursed' which is sometimes used as an alternative for "indemnified" must mean that when a liability is incurred, the warranty is that this liability incurred would be reimbursed. The word 'reimbursed' is used in a wider sense of making appropriate arrangement to ensure that the liability to tax does not lead to any damnification of Jet;

-(v) Clause 16 of the SPA incorporates an indemnity in favour of the purchaser and the Company against all "losses" which may be incurred or suffered by the purchaser and which may arise inter alia from any breach of warranty. Jet's interpretation is that (a) There is a warranty which is triggered when the liabilities are incurred or suffered; (b) When the warranty is triggered, the consequence is that the selling shareholders shall ensure that the purchaser shall be reimbursed without dispute or delay; and (c) If the purchaser is not reimbursed immediately, then an indemnity arises in its favour;

VBC 22 exe.appln16

-(vi) Clause 19 of the Consent Terms provides that clause 16

of the SPA shall remain applicable only in respect of "(i) tax matters as set out in Clause 15.1.1A" of the SPA. The entirety of Clause 16 of the SPA is saved in relation to tax matters. This would include the indemnity in clause 16.1(c) of the SPA to the extent that losses arise out of unknown liabilities relating to tax matters;

-(vii) While it is true that the time for the payment of an installment under Clause 3(c) of the Consent Terms and Award is of the essence of the contract, the obligation of the selling shareholders to reimburse any income tax liability incurred or suffered by the Company without dispute or delay, is peremptory and is required to be performed forthwith. Under Clause 15.1.1A of the SPA, neither the amount nor the time could be predetermined because the liability/obligation was of a contingent nature depending upon the tax liability being incurred or suffered by the Company. The obligation to reimburse is absolute and has to be performed forthwith;

VBC 23 exe.appln161.09

-(viii) There may be there different situations : (i) If the

contingent event contemplated by Clause 15.1.1A arises on the date of the performance of the obligation under clause 3(c) of the Consent Terms, both parties were required to perform their obligation simultaneously; (ii) If the contingent event arises subsequent to the date for the payment of instalments in clause 3(c), the purchaser would be required to perform its obligation on the date mentioned in clause 3(c) of the Consent Terms; (iii) If the contingency arises at a time prior to the date of performance stipulated by Clause 3(c), the Vendors were required to perform their obligations first and in the event of their failure, they would lose the right to claim performance of the purchaser's obligation under Clause 3(c);

-(ix) As on 30 March 2008, income tax liabilities were well in excess of Rs.50 crores, being Rs.444.54 crores under the notice of demand dated 23 August 2007 for A.Y. 2004-05. Alternatively, the liability was Rs.107.08 crores under a letter dated 5 March 2008 of the Chief Commissioner of Income Tax. The keeping in abeyance during the pendency of appeals or challenges to income tax VBC 24 exe.appln161.09 assessment do not affect the pending nature of the liability.

Pursuant to the letter of the tax authorities dated 23 February 2009, Jet paid Rs.50 crores by five challans each of Rs.10 crores;

-(x) The intention of the parties in Clause 15.1.1A of the SPA was to provide for immediate payment in the event that income tax liabilities are incurred or suffered. The language of "reimbursement" is incidental thereto. Clause 16 of the SPA must be harmoniously read together with Clause 15.1.1A. Clauses 16.1 and 16.4 deal with losses which may be incurred or suffered and not with reimbursement. Clause 19 of the Consent Terms continues to make Clause 16 applicable in respect, inter alia, of tax matters as set out in Clause 15.1.1A. Clause 16.4 of the SPA, therefore, remained applicable and operative;

-(xi) It is a settled principle of law that once the indemnified has incurred a liability and that liability is absolute, it is entitled to call upon the indemnifier to save it from that liability and to make payment. The order under Section 220(6) of the Income Tax Act, 1961, which was made on 5 March 2008, casts an obligation upon VBC 25 exe.appln161.09 the Company to pay a sum of over Rs.100 crores though in instalments. The liability to pay was intact and the Company was only saved of coercive recovery and penal interest if it complied with the order.

IV The Consent Terms:

17. The heart and substance of the present case turns upon the Consent Terms which were arrived at between Jet and Sahara on 12 April 2007. The Consent Terms form the basis and foundation of the award of the arbitral tribunal. The salient features of the Consent Terms have to be analysed. The Consent Terms contain in clause (1) an agreement and declaration that the Share Purchase Agreement dated 18 January 2006 read with agreements dated 23 March 2006 and 29 March 2009 as modified therein, is valid, subsisting and binding. Clause (2) of the Consent Terms stipulates that Jet do purchase and the selling shareholders do sell to Jet, the entire existing equity and preference shares of Sahara Airlines Limited. Clause (3) of the Consent Terms is reflective of the position that the original purchase price of the shares under the SPA was Rs.2000/- crores. There was a dispute VBC 26 exe.appln161.09 whether the conditions precedent had been satisfied and the amount had become due and owing. Parties arrived at a reduced consideration of Rs.1450/- crores which the terms order "that Jet do pay to the selling shareholders" in the manner indicated. Rs.

500/- crores was paid by Jet prior to the signing of the Consent Terms, while Rs.400/- crores was to be paid on the closing date.

Clause 3(c) of the Consent Terms envisages that the balance of Rs.

550/- crores would be paid on the dates stipulated therein "without any interest and without any deduction and set off".

Instalments each of Rs.137.50 crores were thus to be paid on or before 30 March 2008, 30 March 2009, 30 March 2010 and 30 March 2011. Clause (5) of the Consent Terms stipulates that the time mentioned in clause (3), is of the essence of the contract contained in the Consent Terms. The

Consent Terms then stipulate the consequence of the default. The consequence is that "the concession (i.e. reduction in price) agreed to between the parties hereto, in the sum of Rs.550/- crores from the originally agreed price of Rs.2,000/- crores, shall stand automatically withdrawn and the consideration hereunder shall stand automatically restored from Rs.1,450/- crores to Rs.2,000/- crores". Jet would VBC 27 exe.appln161.09 then become liable to pay and the terms order that Jet "do pay" to the selling shareholders, the full originally agreed price of Rs.

2,000/- crores, by making a payment of Rs.550/- crores in addition to the amounts mentioned in clause 3(a), (b) and (c). Moreover, it has been agreed that if Jet fails to pay on the due date any of the instalments mentioned in clause 3(c), the entire amount remaining unpaid under clause 3(c) as well as the amount of Rs.550/- crores, in addition, would become forthwith due and payable and "the selling shareholders shall be entitled to forthwith execute the award for recovery of the sum due pursuant to this clause".

However, the liability of Jet to pay an additional amount of Rs.

550/- crores, was to arise only if the selling shareholders have performed their indemnity obligation in the SPA as amended and the obligation to transfer new preference shares to Jet.

18. Clauses 3 and 5 of the Consent Terms lead to the following position:

> (i) The originally agreed price for the sale of the equity and preference shares of Sahara Airlines Limited to Jet was Rs.2,000/-

crores;

VBC 28 exe.appln161.09

(ii) In order to resolve the disputes which had arisen

between the parties, a concession was made available to Jet under which the price would be reduced to Rs.1,450/- crores;

(iii) The concessional price was subject to the payment being made in the manner and in accordance with the stipulations contained in clause 3;

(iv) Clause 3 contains a positive command ordering that Jet do pay to the selling shareholders a sum of Rs.1,450/- crores in the manner indicated;

(v) The balance of Rs.550/- crores under clause 3(c) had to be paid in four installments each of Rs.137.5 crores on the dates indicated - on or before the thirteeith days of March of 2008, 2009, 2010 and 2011;

(vi) Each instalment of Rs.137.5 crores was liable to be paid without any deduction and set off;

(vii) Time for the payment of the instalments set out in clause 3 of the Consent Terms was of the essence of the contract;

(viii) In the event that Jet failed to pay by the due date any of the instalments referred to in clause 3(c), the concession granted of VBC 29 exe.appln161.09 the reduction in price would stand automatically withdrawn and the consideration would automatically stand restored to Rs.2,000/-

crores;

(ix) Upon default, Jet would become liable and it was ordered that it do pay to the selling shareholders, the full originally agreed price of Rs.2,000/- crores by making a payment of an additional amount of Rs.550/- crores, over and above the amount mentioned in clause 3(a), (b) and (c);

(x) The liability of Jet to pay the additional amount of Rs.

550/- crores would only arise if the selling shareholders had performed their indemnity obligation under the SPA as amended by the Consent Terms and the obligation to transfer new preference shares to Jet;

(xi) The performance of the indemnity obligation is a condition which attaches to the liability to pay the enhanced consideration of Rs.550/- crores and does not attach to the reduced price of Rs.1,450/- crores. As regards the latter, under clause 3(c) of the Consent Terms, the balance of Rs.550/- crores had to be paid so as to make up the concessional price of Rs.1,450/- crores and that payment had to be made without any interest and without any VBC 30 exe.appln161.09 deduction and set off.

19. Clause 6 of the Consent Terms stipulates that all the conditions precedent mentioned in the SPA as amended or otherwise had been fulfilled and/or waived by Jet.

Clause 16 of the Consent Terms provides as follows:

> "It is hereby agreed and declared that save and except the representations and warranties mentioned in (1) Clauses 15.1.1A and 15.7 pertaining only to tax matters, (2) Clauses 15.1.5 to 15.1.9 (except as contemplated herein and the pledge created in favour of JET) and (3) 15.3.1 to 15.3.3 all other representations and warranties contained in Clause 15 of the SPA (as amended) and Annexure 11 have been satisfied and/or waived by JET and in any event do not survive."

20. Clause 16 of the Consent Terms saves the representations and warranties mentioned in Clause 15.1.1A and Clause 15.7 of the SPA pertaining only to tax matters. Hence, in order to appreciate the ambit of Clause 16 of the Consent Terms, it would be necessary to advert to the representations and warranties mentioned in Clauses 15.1.1A and 15.7 of the SPA, pertaining to tax matters.

Clause 15 of the SPA is titled "representations and warranties".

VBC 31 exe.appln161.09 Under Clause 15.1.1A, the selling shareholders represented to Jet that subject to disclosed liabilities:

> "all Income tax liabilities incurred or suffered in excess of Rs.50/- crores of the Company, including any fines and penalties relating thereto, arising out of any transactions or events done before effective date shall be reimbursed (without dispute or delay) by the Vendors".

Under Clause 15.7 of the SPA, all warranties were to survive only until 30 June 2007, except those relating to tax matters of the Company which would survive for a period of six years from the relevant Assessment Year or such longer period as prescribed in the relevant statutes in force.

21. Clause 16 of the SPA deals with indemnification. Clauses 16.1, 16.3 and 16.4 were to the following effect:

> "16.1 The Vendors hereby jointly and severally indemnify, defend and hold harmless the Purchaser and the Company from and against any and all Losses which may be incurred or suffered by the Purchaser or the Company, and which may arise out of or result from:
>
> (a) any breach of any Warranties (of the Vendors and/or the Company), obligations, covenants or agreement of the Vendors contained in this Agreement; or
>
> (b) any liability or claim relating to the period on or before the Effective Date which are not Disclosed Liabilities;
>
> VBC 32 exe.appln161.09
>
> (c) any Losses, liability or claim relating to (i) Transferred Employees as stipulated in Clause 12.2 or,
>
> (ii) any Losses of the Company or any undisclosed or unknown liability or Losses (other than Disclosed Liabilities), including those pursuant to any order or judgment of any court or judicial authority relating to a period or event or circumstance which occurs before the Effective Date.

16.3 The Purchaser or the Company to claim indemnification for any Losses from the Selling Shareholders under this Clause, shall promptly provide a written notice of the same to the Selling Shareholders along with all the documents if any available with it, in respect of the Losses claimed. The Selling Shareholders shall within 15 (fifteen) days of the Purchaser or the Company incurring or suffering any Losses, make payment to the Purchaser or the Company, as the case may be for such Losses. The Purchaser shall not be entitled to claim indemnification from the Selling Shareholders until and unless the amount of Losses (whether arising from a single claim or multiple claims) exceeds an amount of Rs.5,00,00,000 (Rupees Five Crores only).

Provided however, the said provision shall not apply to a claim arising due to a material breach of the obligations under Clause 12.

16,4 Notwithstanding anything contained herein, the Purchaser shall not be entitled to claim any indemnification from the Selling Shareholders for any Losses incurred or suffered by the Purchaser in respect of the Tax matters, contained in paragraph E of Annexure 11 hereto, until and unless the amount of Losses arising therefrom exceeds Rs.50,00,00,000/- (Rupees Fifty Crores only)."

VBC 33 exe.appln161.09 Under paragraph E of Annexure 11 to the SPA, there was a representation and warranty that the tax returns have been correct and made on a proper basis and none of the returns, accounts or information provided therewith had been disputed by the fiscal authority concerned.

22. The liability of Jet to pay the originally agreed consideration of Rs. 2,000/- crores (involving the payment of additional sum of Rs.550/- crores over and above the reduced consideration of Rs.1,450/- crores) in the event of default, was to arise only if the selling shareholders had performed their indemnity obligation in the SPA. The indemnity obligation extended to any losses which may be incurred or suffered by the purchaser or the Company which may arise out of or result from a breach of any warranty, obligation, covenant or agreement of the Vendors contained in the agreement. It also covered "any losses of the company or undisclosed or unknown liability or losses (other than disclosed liabilities).

VBC 34 exe.appln161.09

23. Now, it is in the background of these Consent Terms that it would be necessary for the Court to make an evaluation of the facts as they have come on the record.

24. According to Sahara, the amount which has been claimed in Execution Application 161 of 2009 has become payable on account of the occurrence of two conditions, namely: (i) A failure on the part of Jet to comply with its obligation to pay without any deduction and set off, the amount of Rs.550/- crores (being part of the concessional amount remaining payable for the purchase of the shares) under Clause 3(c) of the Consent Terms; and (ii) There being no failure on the part of Sahara to perform as on 30 March 2008, its indemnity obligation as required under Clause 5 of the Consent Terms.

V The obligation to pay without deduction or set off

25. Now, the admitted position before the Court is that on 31 March 2008 (the previous day - 30 March 2008 - being a Sunday), Jet paid an amount of Rs. 100.42 crores. Out of the instalment of VBC 35 exe.appln161.09 Rs. 137.5 crores that was due on or before 30 March 2008, Jet deducted and adjusted an amount of Rs. 37.08 crores which was deposited with the Income Tax authorities. The amount of Rs.

550/- crores was liable to be paid by Jet to Sahara under clause 3(c) of the Consent Terms without any interest and without any deduction and set off on or before the date stipulated. Time was the essence of the contract. Upon the failure of Jet to pay the first instalment of Rs. 137.5 crores on or before 30 March 2008, the consequence envisaged in the Consent Terms had to inexorably ensue (subject to the selling shareholders' compliance with indemnity obligations). The plain consequence of the default was that the concession stood withdrawn and the originally agreed price of Rs.2,000/- crores stood restored automatically. The Consent Award directed Jet to pay ("do pay") the originally agreed price of Rs.2,000/- crores.

26. However, it has been sought to be urged on behalf of Jet that the obligation to pay without any deduction or set off, was other than that contemplated by the clauses contained in the representations and warranties made on behalf of the selling VBC 36 exe.appln161.09 shareholders as well as the indemnity obligations undertaken by them. This contention is set out in Chamber Summons 551 of 2009 taken out by Jet in the following extract:

> "24. On a con-joint reading of the SPA and of the Consent Award as well as the aforesaid provisions contained in the SPA, it is submitted that the words "and without any deduction and set off " appearing in Clause 3(c) of the Consent Award must and ought to mean: any deductions or set-off "without any deductions and set-
>
> off" other than those contemplated by the Clauses containing the Representations and warranties made on behalf of all the Selling Shareholders as well as the indemnity obligations undertaken by the Selling Shareholders, including Second Claimant No.8.
>
> (Sahara)"

This submission, which has been urged on behalf of Jet, is plainly erroneous. Under the last part of Clause 5 of the Consent Terms, it has been provided thus:

> "It is agreed and clarified that the liability of Jet to pay the additional sum of Rs.550 crores mentioned in this clause shall arise only if the Selling Shareholders have performed their indemnity obligations in the SPA as amended by these Consent Terms and the obligation to transfer the new preference shares to Jet under Clause 12 herein."

The concluding part of Clause 5 of the Consent Terms extracted above, applies only to the payment of the additional amount of Rs.

VBC 37 exe.appln161.09 550/- crores, this being in addition to the payment of Rs.1,450/-

crores under Clauses 3(a), (b) and (c). Evidently, the concluding part of Clause 5 of the Consent Terms does not apply to the payment of an amount of Rs.550/- crores covered in the four instalments stipulated in Clause 3(c). Compliance of indemnity obligations is a condition which parties attached to the restoration of the originally agreed consideration of Rs.2,000/- crores by the payment of an amount of Rs.550/- crores, over and above the reduced consideration of Rs.1,450/- crores. Accepting the contention of Jet would fly in the face of the contractual stipulation that the payment of the instalments stipulated in Clause 3(c) was to be effected without any deduction or set off. If the amounts which were liable to be paid under Clause 3(c) were subject to a deduction at the behest of Jet, then the last part of Clause 5 of the Consent Terms would have been a mere surplusage and wholly unnecessary.

27. The Court would have to attribute a commercial sense to the use of the words "without any deduction and set off". In VBC 38 exe.appln161.09 Aiyer's Major Law Lexicon,1 the significance of the use of the expression "without any" is explained thus:

> "When 'any' is preceded by a negative, expressed or implied, the two are together equivalent to an emphatic negative, 'none at all', 'not even one', as there has never been any doubt about that."

Hence, on the first aspect of the case, the conclusion which would have to be arrived at by the Court is that Jet was in default of its obligation under Clause 3(c) to pay an amount of Rs. 137.5 crores on or before 30 March 2008 without any deduction or set off. By deducting an amount of Rs.37.08 crores and paying over an amount of Rs.100.42 crores, Jet clearly acted in breach of its obligation under Clause 3(c) of the Consent Terms.

VI Indemnity obligations

28. The next aspect of the case which merits analysis is whether there was a failure on the part of Sahara to perform its indemnity obligations on 30 March 2008. The liability of Jet to pay the additional amount of Rs.550/- crores would arise only if the selling shareholders had performed their indemnity obligations 1 4th edition, 2010 - Page 393 VBC 39 exe.appln161.09 under the SPA as amended by the Consent Terms. Clause 19 of the Consent Terms stipulates that clause 16 of the SPA would remain applicable only to the extent stipulated therein. Clause 16 was to remain applicable in respect of the tax matters as set out in Clause 15.1.1A

29. Clause 15.1.1A stipulates that "all Income tax liabilities" "incurred or suffered" in excess of Rs.50/- crores arising out of any transactions or events done before the effective date "shall be reimbursed" without dispute or delay, by the Vendors. The obligation of the Vendors was to reimburse. The reimbursement was to be of income tax liabilities incurred or suffered in excess of

Rs.50/- crores. The terms 'reimburse' and 'incurred' or 'suffered' fall for consideration. The words 'reimbursed', 'incurred' or 'suffered' which are used in Clause 15.1.1A of the SPA must be harmoniously construed and the clause must be read as a whole. In Laxminarayan vs. Returning Officer,2 the Supreme Court construed the meaning of the expression 'incurred' in Sections 96 and 119 of the Representation 2 (1974) 3 SCC 425 VBC 40 exe.appln161.09 of the People Act, 1951. The Supreme Court held that the expression 'incurred' means "actually spent". In State of Madhya Pradesh vs. Indore Iron & Steel Mills Pvt. Ltd.,3 the Supreme Court while construing the meaning of the expression 'suffered' in a notification issued by the State in exercise of powers conferred by Sales Tax Legislation held as follows :

> "In our view, the words of the said notification under the State Sales Tax Act are so clear that they leave no doubt whatsoever and cannot be subjected to any construction but one, namely, that only goods upon which the entry tax under the Entry Tax Act has been paid are entitled to the exemption thereunder. There has to be actual payment. The impact of the entry tax upon the goods for which the exemption is sought has to be felt; only then is the exemption available. The use of the word "suffered"

makes this plain."

The expression 'reimbursed' has similarly arisen for interpretation in several decided cases. In Tata Iron and Steel Co Ltd. vs. Union of India,4 the Supreme Court interpreted the words "reimbursed to the exporter" in the context of the International Price Reimbursement Scheme. The Supreme Court held as follows:

> "In common acceptation the word "reimburse" means and implies "to pay back or refund": As a matter of fact it denotes restoration of something paid in excess; as

3 (1998) 6 SCC 416 4 (2001) 2 SCC 41 VBC 41 exe.appln161.09 regards the respondent Union of India it cannot but mean to indemnify having regard to the common grammatical meaning of the word "reimbursement". Reimbursement has to mean and imply restoration of an equivalent for something paid or expended.

Reimbursement presupposes previous payment."

The Supreme Court held that as a matter of fact, there could be no reimbursement for expenses which had never been incurred.

30. In a judgment of a Division Bench of the Patna High Court in Nandlal Singh vs. Ram Kirit Singh,5 the Court made a distinction between the words 'reimburse' with 'contribute' or 'contribution' in Section 43 of the Contract Act, 1872. In the context of the Fertilizer Control Order, 1985 issued under the provisions of the Essential Commodities Act, a Division Bench of the Delhi High Court in Deepak Fertilizer & Petrochemicals Corporation Ltd. vs. Union of India,6 held that 'reimbursement' means "in ordinary parlance repayment of what has been spent".

In a judgment of the Rajasthan High Court in Rajasthan State Electricity Board vs. Employees' State Insurance Corporation,7 5 AIR 1950 Patna 212 6 1996 (38) DRJ 229 7 1975 WLN (UC) 261 VBC 42 exe.appln161.09 the expression 'reimburse' has been construed to mean "to repay, to pay in equivalent to for loss or expense".

31. Black's Law Dictionary8 defines the expression 'reimburse' as follows:

> "Reimburse. To pay back, to make restoration, to repay that expended; to indemnify, or make whole. Los Angles County v. Frisbie, 19 Cal.2d 634, 122 P.2d 526."

In P.Ramanath Aiyer's The Law Lexicon,9 the meaning of the expression 'reimburse' has been defined thus:

> "To reimburse is to pay back, and this primary meaning to the word is to be imputed to it, where the meaning is not controlled by context or contract stipulations.
>
> The primary meaning of the word "reimburse" is to pay back; to make return or restoration of an equivalent for something paid, expended, or lost; to indemnify; to make whole."

Justice C.K.Thakker's, Encyclopaedic Law Lexicon10 adverts to the meaning of expression 'reimbursement' as :

> "To pay back an equivalent for what has been spent or lost, to indemnify, to refund to recompense, to return the 8 Sixth Edition 9 2nd Edition page 1641 10 Vol.4 page 4038 VBC 43 exe.appln161.09 money."

32. In its letter dated 26 March 2008, Jet understood the expression "reimbursement" to mean a repayment by Sahara of an amount which had been actually expended by Jet:

> "Since the aforesaid sum of Rs.37.08 Crores has already been remitted by us on your behalf, please note in case the reimbursement is not received on or before that date, we would be adjusting the sum of Rs.37.08 crores paid to Income Tax ...."

In an affidavit dated 31 March 2009 filed in Chamber Summons 551 of 2009, Jet's understanding of the provision appears from the following extract:11 "14. The First Claimant consequently put the Second Claimant No.8 to the notice of their making this payment of such tax dues, the liability for which was that of Second claimant Nos.2 to 8. The First Claimant further expressly pointed out to the Second Claimant No. 8 that although as per the Arbitral Award dated 12th April, 2007, a first instalment of Rs.137.5 crores was payable since the aforementioned sum of Rs.37.08 crores had been paid by them towards the aforementioned tax dues and if the First Claimant did not receive reimbursement on or before 30th March, 2008 they would be adjusting the sum of Rs.37.08 crores paid to the Income Tax Department."

In its subsequent affidavit dated 23 April 2009,12 Jet claims that it 11 Para 14 page 8 of Chamber Summons 551/09 12 Para 41, page 19 in Chamber Summons 685/09 VBC 44 exe.appln161.09 was "labouring under the mistaken belief" that it "was entitled to reimbursement of only those tax liabilities against which the actual payments had been made", though on a true and correct interpretation of Clause 15.1.1A of the SPA, it was entitled to be reimbursed all tax liabilities incurred or suffered in excess of Rs.50 crores.

33. While interpreting the meaning of an expression used in a commercial document the Court would be justified in placing reliance on contemporaneous statements made by the parties as indicative of their intent. That such a course of action is open to the Court as a matter of principle is founded on the judgment of the Supreme Court in Godhra Electricity Co.Ltd. vs. State of Gujarat.13 Mr.Justice K.K.Mathew, speaking for the Supreme Court held thus:

> "When both parties subsequently say that by the word or phrase which, in the context is ambiguous, they meant this, it only supplies a glossary as to the meaning of the word or phrase. After all, the inquiry is as to what the intention of the parties was from the language used. And, why is it that parties cannot clear the latent ambiguity in the language by a subsequent interpreting statement? If the meaning of the word or phrase or 13 AIR 1975 SC 32 VBC 45 exe.appln161.09 sentence is clear, extrinsic evidence is not admissible. It is only when there is latent ambiguity that extrinsic evidence in the shape of interpreting statement in which both parties have concurred should be admissible. The parties themselves might not have been clear as to the meaning of th word or phrase when they entered into the contract. Unanticipated situations might arise or come into the contemplation of the parties subsequently which would sharpen their focus and any statement by them which would illuminate the darkness arising out of the ambiguity of the language, should not be shut out. In the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible."

In a judgment of the Court of Appeal in the U.K., Lord Denning made the following observations in Amalgamated Investment & Property Co. Ltd. vs. Texas Commerce International Bank Ltd.14:

> "If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it."

14 1981 3 All E.R. 577 VBC 46 exe.appln161.09

-34. The liability of Jet to pay an additional sum of Rs.550/-

crores mentioned in Clause 5 of the Consent Terms would arise only if the selling shareholders had performed their indemnity obligations in the SPA as amended by the Consent Terms. The effect of clause 5 is firstly, to make time of the essence of the contract for compliance with the obligation in Clause 3 to make payment to the selling shareholders on the stipulated date.

Secondly, upon a default by Jet the concession stands automatically withdrawn and the consideration stands automatically restored to Rs.2,000/- crores which is the price that was originally agreed upon between the parties. Thirdly, Jet becomes liable to pay and is commanded to pay the full price of Rs.2,000/- crores. The clarification contained in the last part of Clause 5, however, is that the liability of Jet to pay the additional sum of Rs.550/- crores mentioned in the clause, shall arise only if the selling shareholders have performed their indemnity obligations in the SPA. If the selling shareholders have not complied with their indemnity obligations, Jet is not liable to pay the additional consideration and in that case, the consideration payable would be pegged at Rs.

1,450/- crores. There was, in the present case, a breach by Jet of VBC 47 exe.appln161.09 the obligation to pay the amount of Rs. 137.5 crores without deduction or set off on or before 30 March 2008. The liability of Jet to pay an additional consideration of Rs.550/- crores as stipulated in Clause 5 arises only if the selling shareholders had fulfilled their indemnity obligations.

-35. Clause 15 of the SPA sets out representations and warranties, while clause 16 provides for a covenant of indemnity.

Now, what clause 16 of the Consent Terms does is to provide that the representations and warranties mentioned in Clause 15.1.1A and Clause 15.7, pertaining only to tax matters would survive. The indemnity obligations of the Vendors are stipulated in Clause 16 of the SPA. In Clause 16.1 the Vendors indemnify both the purchaser and the Company against "any and all losses which may be incurred or suffered" and which may arise out of or result from (a) any breach of any warranties, obligations, covenants or agreement of the Vendors; (b) any liability or claim relating to a period prior to the effective date which are not disclosed liabilities; and (c) any losses, liability or claim relating inter alia to .. "any losses of the company or any undisclosed or unknown liability or losses (other VBC 48 exe.appln161.09 than disclosed liabilities)". The expression "losses" has been defined in clause 1.1.26A of the SPA to mean all losses, liabilities, costs, charges, expenses, taxes, claims, and demands among other things. Clause 16.3 mandates that in order to claim indemnification for losses, the purchaser or the Company must provide a written notice to the selling shareholders together with documents and the selling shareholders shall within fifteen days of the purchaser or the Company incurring or suffering any losses make payment to the purchaser or the Company, as the case may be. Unless the amount of loss exceeds Rupees Five crores, the purchaser is not entitled to claim indemnification. However, Clause 16.4 which has a non-obstante provision stipulates that in respect of the tax matters contained in paragraph E of Annexure 11, the purchaser cannot claim indemnification unless and until the amount of losses exceeds Rupees fifty crores.

-36. Now, in the present case, the material on the record indicates that on 5 March 2008, the Chief Commissioner of Income Tax (Central) had called upon Jet Lite to deposit an amount of Rs.

107.08 crores in three instalments by 20 March, 15 April and 15 VBC 49 exe.appln161.09 May 2008. The balance of the demand of Rs. 262.46 crores was kept in abeyance till the disposal of the appeal. On 26 March 2008, the attention of Sahara was drawn to the order of the Chief Commissioner of Income Tax and to the fact that Jet had made payment of Rs. 37.08 crores under legal advice on 24 March 2008.

Jet claimed a reimbursement of an amount of Rs. 37.08 crores placing reliance on Clause 16 of the SPA. The response of Sahara on 28 March 2008 was that since the payment made towards income tax liability did not exceed Rupees fifty crores, the selling shareholders were not liable to indemnify Jet Lite. On 29 March 2008, Jet recorded that the language of the SPA was clear - if the liability exceeded Rupees Fifty Crores, it would fall within the scope of the indemnity. Jet's case was that the sum of Rupees fifty crores was descriptive of the nature of the liability and did not change with any instalments that may be given in discharge of the liability. Jet reiterated its claim based on the indemnity obligations under the SPA. Sahara's contention in a letter dated 29 March 2008 was that Jet had not suffered or incurred an income tax liability in excess of Rupees fifty crores and hence, the selling shareholders were not liable to indemnify Jet under the SPA. Jet's VBC 50 exe.appln161.09 communication dated 2 April 2008 stated its position that the Consent Terms cast reciprocal obligations and a refusal to pay upon the indemnity clause in the face of a statutory order raising a liability entitles it to deduct the sum claimed under the indemnity.

As already held earlier, Jet was not entitled to deduct or set off the sum of Rs.37.08 crores as it purported to do from the instalment that was payable by 30 March 2008. But the question still survives as to whether Sahara had wrongfully repudiated its obligation to indemnify Jet. Sahara in its letter dated 8 April 2008 contended that since the payment did not exceed Rupees fifty crores, the selling shareholders were not liable to indemnify Jet.

37. Clause 16 of the SPA attaches to all losses which are incurred or suffered inter alia out of the breach of any warranties or of any losses of the Company other than disclosed liabilities.

Losses as defined by the parties include taxes and demands. Under Clause 15.1.1A, the obligation of the selling shareholders is to reimburse any income tax liability incurred or suffered by the Company without dispute or delay. The expression "liability" is VBC 51 exe.appln161.09 defined by Black's Law Dictionary15 as meaning "the quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment". A liability contemplates a financial or pecuniary obligation. In First National Bank Ltd. vs. Seth Sant Lal,16 a Learned Single Judge held that :

> "15. The term "liability" is of large and comprehensive significance, and when construed in its usual and ordinary sense, in which it is commonly employed, it expresses the state of being under obligation in law or in justice"

In Superintendent and Remembrancer of Legal Affairs to Government of West Bengal vs. Abani Maity,17 the Supreme Court observed thus, while construing the expression "liable":

> "It is true that ordinarily, the word "liable" denotes: (1) "Legally subject or amenable to", (2) "Exposed or subject to or likely to suffer from (something prejudicial)", (3) "Subject to the possibility of (doing or undergoing something undesirable)" (Shorter Oxford Dictionary).
>
> According to Webster's New World Dictionary, also, the word "liable" denotes "something external which may befall us".

15 Eighth Edition page 932 16 AIR 1959 Punjab 328 17 (1979) 4 SCC 85 VBC 52 exe.appln161.09 In certain statutes, noted the Supreme Court, the expression "liable" has been held as importing even a possibility of attracting an obligation or penalty. P.Ramanatha Aiyar's Advanced Law Lexicon18 inter alia provides the following definition of the expression :

> "A broad term; it may be employed as meaning the state of being liable, that for which one is responsible or liable, obligation in general; that condition of affairs which gives rise to an obligation to do a particular thing to be enforced by action; responsibility; legal responsibility."
>
> "Liability" as defined means responsibility to law, a duty which is enforceable by law. In Kapur Chand Pokhraj vs. State of Bombay,19 the Supreme Court while construing the expression "liability incurred" in Section 48(2) of the Bombay Sales Tax Act, 1953 held that the expression is general and comprehensive and would cover both a civil and criminal liability. Hence, there was no conceivable reason to impute to the Legislature the intention to wipe out offences committed under the repealed Act, when it had retained the same offences under the repealing Act.

18 2009 Reprint 3rd Edition page 2721 19 AIR 1958 SC 993 VBC 53 exe.appln161.09

38. On 5 March 2008, an order was passed under Section 220(6) of the Income Tax Act, 1961, which cast an obligation on Jet Lite to pay a sum over Rs.100/- crores. The order allowed instalments of payment but what was significant is that Jet Lite was under an obligation enforceable in law to make a payment of an amount in excess of Rs.50/- crores. The provisions of Section 220(6) of the Income Tax Act, 1961 would show that as a matter of law, the order of the Chief Commissioner merely put Jet Lite outside the category of an assessee in default if it complied with the terms of the order. The liability to pay, as Jet submits correctly before the Court, was intact and it was spared of a coercive recovery and additional penal interest if it complied with the order.

39. In this context, it would be appropriate to refer to the judgment of the Supreme Court in Kedarnath Jute Manufacturing Co. Ltd. vs. Commissioner of Income Tax (Central), Calcutta.20 In that case a liability on account of tax had been quantified and a demand had been created and communicated by a notice. During 20 (1972) 3 SCC 252 VBC 54 exe.appln161.09 the pendency of assessment proceedings before the Income Tax Officer and finalization of assessment, the Supreme Court held that "it is not possible to comprehend how the liability would cease to be one because the assessee has taken proceedings before higher authorities for getting it reduced or wiped out so long

as the contention of the assessee did not prevail with regard to the quantum of liability". The Supreme Court affirmed the view of the Madras High Court in Pope The King Match Factory Vs. Commissioner of Income Tax , Madras,21 to the effect that an assessee incurs an enforceable legal liability on and from the date on which he received the Collector's demand for payment and that his endeavour to get out of that liability by preferring appeals could not detract from or retard the efficacy of the liability which has been imposed upon him by the competent Excise authority.

40. Jet has submitted before the Court that under general principles of law, once a person who has been indemnified has incurred liability and that liability is absolute, he is entitled to call upon the indemnifier to save it from that liability and to make 21 (1963) 50 ITR 495 (Mad).

VBC 55 exe.appln161.09 payment. This is premised on the fact that an indemnity may be worth little if the indemnified cannot enforce an indemnity till he actually pays the liability. The first judgment on the subject to which it is necessary to turn, is a judgment of Mr.Justice M.C. Chagla (as the Learned Chief Justice then was) in Gajanan Moreshwar Parelkar vs. Moreshwar Madan Mantri.22 In that case, the Defendant to a suit for declaration that was instituted on an indemnity, urged that unless the indemnified suffered a loss, he was not entitled to sue the indemnifier and in that connection, reliance was placed on Sections 124 and 125 of the Contract Act.

The Plaintiff to the suit, had been furnished an indemnity by the Defendant of discharging two mortgages. In that context, it was argued on behalf of the Defendant that unless the mortgagee filed a suit against the Plaintiff and obtained a judgment which the Plaintiff was compelled to satisfy, the Plaintiff was not entitled to sue the Defendant. Justice Chagla held that the Indian Contract Act is an amending and consolidating legislation and is not exhaustive of the law of contract to be applied by Courts in India.

The Learned Judge held that if the indemnified has incurred a 22 44 BLR 704 (1942) VBC 56 exe.appln161.09 liability which is absolute, he is entitled to invoke the indemnity by calling upon the indemnifier to pay the demand. In a subsequent judgment, Justice P.B. Gajendragadkar (as the Learned Chief Justice of India then was) spoke for a Division Bench of this Court in Khetarpal vs. Madhukar Pictures,23 and while affirming the principle enunciated by Justice Chagla in Gajanan Moreshwar that Sections 124 and 125 are not exhaustive of the rights of an indemnity holder held as follows:

> "On this view, an indemnity-holder is entitled to sue the indemnifier even before he has incurred any damage, provided of course the indemnity-holder is able to satisfy the Court about the existence of a clear enforceable claim against him and is able to show that it is in respect of such a clear enforceable claim that a contract of indemnity has been executed.
>
> ...
>
> We are, therefore, disposed to take the view that the rights of the indemnity-holder should not and need not be confined to those mentioned in S.125, Contract Act. Even

> before damage is incurred by the indemnity-holder, it would be open to him to sue for the specific performance of the contract of indemnity, provided of course it is shown that an absolute liability has been incurred by him and that the contract of indemnity covers the said liability."

The law on the subject has similarly been considered in a judgment 23 AIR 1956 Bom. 106 VBC 57 exe.appln161.09 of the Calcutta High Court in Osman Jamal & Sons Ltd. vs. Gopal Purshattam.24 The Court cited the judgment of Buckley L.J. in re: Rechardson Ex parte The Governors of St.Thomas's Hospital,25 to the following effect :

> "Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called to pay....."

41. In the present case, there was a liability imposed upon Jet Lite by the Income Tax authorities on 5 March 2008. That was in the amount of Rs. 107.08 crores. It was in respect of a clear enforceable claim that the contract of indemnity had been executed. The indemnity covered losses which may be incurred and losses were defined clearly to include taxes, claims and demands. After the Consent Terms were entered into between the parties, the warranty contained in Clause 15.1.1A of the SPA survived in respect of tax matters. The warranty was triggered when a liability was incurred or suffered. Once the warranty was triggered, the consequence was that the selling shareholders had to ensure that the purchaser shall be reimbursed without dispute or 24 (1928) ILR 56 Calcutta 262 25 (1911) 2 K.B. 705 VBC 58 exe.appln161.09 delay. If they were not reimbursed immediately, an indemnity arose in their favour which Jet was entitled to and has lawfully invoked. The instalments granted to Jet by the Chief Commissioner of Income Tax did not alter the nature of the liability, the instalment being only a facility for payment. The liability was in excess of Rupees Fifty Crores. Jet had in fact paid an amount of Rs.37.08 Crores to the Income Tax authorities and claimed reimbursement of that amount on 26 March 2008. Jet was entitled to demand reimbursement as it did from the selling shareholders. Sahara was in breach of its indemnity obligations on 30 March 2008 inasmuch as it repudiated the obligation to indemnify on the fallacious reasoning that the liability was less than the threshold of Rs.50 crores. Once the Court comes to the conclusion that there was a failure on the part of Sahara to fulfill its indemnity obligations in the SPA, as amended by the Consent Terms, the liability of Jet to pay the additional sum of Rs.550/-

crores did not arise.

VII The current position : A.Ys. 2004-05, 2005-06, 2006-07

42. In an affidavit dated 26 April 2011 filed on behalf of Jet, VBC 59 exe.appln161.09 a tabulated statement has been furnished regarding income tax liabilities for Assessment Years 2004-05, 2005-06 and 2006-07.

The tax liability including interest, under those assessment orders/orders of penalty was originally computed at Rs.1,233.99 crores. The tax liability after giving effect to orders passed in appeal by the Commissioner of Income Tax (Appeals), has been reduced to Rs.2.84 lakhs comprising of penalties

for Assessment Years 2004-05 and 2005-06. Consequently, it has been stated that tax payment effected by the Company aggregating to Rs.240.48 crores has since been refunded by the Income Tax Department, consequent to the orders passed by the C.I.T. (Appeals). The tabulated statement indicates that the Income Tax Department has filed an appeal before the Income Tax Appellate Tribunal against the order of the C.I.T.(Appeals) for Assessment Year 2004-05 and that "going by the past precedent, it is likely that the Income Tax Department may file an appeal" to the Tribunal for Assessment Years 2005-06 and 2006-07. In view of this factual position, Jet has through its Senior Counsel informed the Court that it is not pressing Execution Application 180 of 2009 but with liberty to adopt proceedings in future if the occasion so arises. By a separate VBC 60 exe.appln161.09 order passed by the Court on 26 April 2011, Execution Application 180 of 2009 has accordingly been disposed of as not pressed, with liberty reserved as prayed. In the event that a fresh proceeding is initiated by Jet, all the rights and contentions of the parties have been kept open in terms of the request made before the Court by Counsel for the contesting parties.

VIII The Deposit of Rs.275 Crores : whether in satisfaction of the decree

43. During the pendency of the Execution Application, Jet has deposited two instalments each of Rs. 137.5 crores in Court.

An order permitting the first deposit of Rs.137.5 crores was passed by the Court on an application by Jet, on 30 March 2010. A request was made on behalf of the Second Claimant Nos.2 to 8 for permission to withdraw the amount deposited. Jet asserted that withdrawal cannot be permitted without furnishing security, whereas it was asserted on behalf of Second Claimant Nos.2 to 8 that withdrawal should be allowed without security since it would enure to the benefit of the consent award. By an order of 15 April 2010 the Second Claimant Nos. 2 to 8 were permitted to withdraw VBC 61 exe.appln161.09 the amount subject to furnishing solvent security. Second Claimant Nos. 2 to 8 did not furnish security. Directions were issued by the Court for the investment of the amount deposited in a fixed deposit of a Nationalized Bank by the Prothonotary and Senior Master. Similar orders have been passed by the Court on 25 March 2011 for the deposit and investment of a further sum of Rs.

137.50 crores by Jet.

44. Order 21 Rule1 of the Code of Civil Procedure 1908 prescribes the modes in which money under a decree can be paid.

All money payable under a decree is required by sub rule (1) to be paid (a) by deposit into the Court whose duty it is to execute the decree, or by sending it to that Court by postal money order or through a bank; or (b) out of Court, to the decree holder by postal money order or through a bank, or by any other mode wherein payment is evidenced in writing; or (c) otherwise, as the Court, which made the decree, directs. Under sub rule 2 where any payment is made under clause (a) or clause (c) of sub rule (1), the judgment debtor has to furnish notice to the decree holder. Under sub rule (3) where money is paid by postal money order or VBC 62 exe.appln161.09 through a bank under clause (a) or clause (b) of sub rule (1) particulars have to be stated including inter alia how the money

remitted is to be adjusted, that is to say, whether towards the principal, interest or costs. Sub rule (4) stipulates that on any amount paid under clause (a) or clause (c) of sub rule (1), interest, if any, shall cease to run from the date of service of the notice under sub rule (2). Under sub rule (2-A) no payment or adjustment shall be recorded at the instance of the judgment debtor unless (a) the payment is made in the manner, provided in rule 1; or (b) the payment or adjustment is proved by documentary evidence; or (c) the payment or adjustment is admitted by, or on behalf of, the decree holder in reply to a notice under sub rule (2) of rule 1, or before the Court. A payment or adjustment which has not been certified or recorded as aforesaid, is not to be recognized by any Court executing the decree.

45. In P.S.L. Ramanathan Chettiar vs. O.R.M.P.R.M Ramanathan Chettiar,26 the Supreme Court has held that the effect of the deposit of money in Court is to place the money 26 AIR 1968 SC 1047 VBC 63 exe.appln161.09 beyond the reach of the parties pending the disposal of the proceedings. The Supreme Court held that in such a case, the decree holder would take out or withdraw the money only against furnishing security and as a result, the payment would not be in satisfaction of the decree. In paragraphs 12 and 13 of the judgment, it was observed thus:

> "(12) On principle, it appears to us that the facts of a judgment-debtor's depositing a sum in court to purchase peace by way of stay of execution of the decree on terms that the decree-holder can draw it out on furnishing security, does not pass title to the money to the decree-holder. He can if he likes take the money out in terms of the order; but so long as he does not do it, there is nothing to prevent the judgment-

debtor from taking it out by furnishing other security, say, of immovable property, if the court allows him to do so and on his losing the appeal putting the decretal amount in court in terms of Order 21 Rule 1 C.P.C. in satisfaction of the decree.

-(13) The real effect of deposit of money in court as was done in this case is to put the money beyond the reach of the parties pending the disposal of the appeal. The decree-holder could only take it out on furnishing security which means that the payment was not in satisfaction of the decree and the security could be proceeded against by the judgment-debtor in case of his success in the appeal. Pending the determination of the same, it was beyond the reach of the judgment-debtor." [emphasis supplied]

46. In the present case, for the reasons already indicated earlier in view of the judgment of the Supreme Court in Ramanathan Chettiar (supra), the effect of the deposit of money VBC 64 exe.appln161.09 in Court was to put it beyond the reach of the parties pending the disposal of the present proceedings. The decree holder could take out the money only upon furnishing security. This in view of the law laid down by the Supreme Court meant that the payment was not in satisfaction of the decree. As a matter of fact, the withdrawal of the amount by the decree holder was opposed by Jet, save and except on condition that security be directed to be furnished for withdrawal.

IX Liability to pay interest

47. The function of the executing Court is to execute the decree as it stands. On behalf of Jet it was urged that the decree does not provide for the payment of interest and hence there is no ascertained liability for the payment of interest which can be the subject matter of execution. Hence, it was urged that the executing Court cannot award interest unless the decree provides for the award of interest.

48. This submission, however, cannot be accepted in view of VBC 65 exe.appln161.09 the specific provisions which have been made in sub section (7) of Section 31 of the Arbitration and Conciliation Act 1996. Sub section (7) of Section 31 provides as follows :

> "(7)(a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
>
> (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."

Clause (b) of sub section (7) statutorily incorporates a provision by which, unless an award has otherwise directed, the sum directed to be paid by an arbitral Tribunal shall carry interest at the rate stipulated therein from the date of the award to the date of payment. In the present case, the award is silent in regard to the payment of interest. Jet's contention is that in the present case the award must be regarded as having "otherwise directed" inter alia having regard to the fact that though the award prescribed the consequences of a default (the restoration of the original consideration) no interest was stipulated. This submission cannot VBC 66 exe.appln161.09 be accepted. No part of the award contains either expressly or by necessary implication a direction that interest shall not be paid.

The liability to pay interest arises under clause (b) of sub section (7) of Section 31. The liability to pay interest becomes a part of the decree under the law.

X Apportionment between interest and principal

49. On behalf of Second Claimant Nos.2 to 8 it was urged that the payments which have been made by Jet would have to be apportioned first between interest and then against principal. This is disputed in the submissions which have been urged on behalf of Second Claimant Nos. 2 to 8 who urged that (i) Jet had made it clear, whilst making payments that they were being effected towards the installments under the consent award to which there was no objection or demur; and (ii) An appropriation was made by Second Claimant Nos.2 to 8 towards principal.

50. On this aspect of the matter, the law is clear. The position emerges from the judgment of the Supreme Court in VBC 67 exe.appln161.09 Industrial Credit & Development Syndicate v. Smithaben

H. Patel27. In that case in a suit filed by the appellant a decree was passed on the basis of a mortgage deed executed by the respondents. The decree provided for the payment of a certain sum together with future interest. The judgment debtors having failed to pay the full amount the appellant filed an execution petition in which the executing Court held that the decree holder was entitled to initiate steps for the recovery of the balance. The assertion of the judgment debtor that the payment made was in liquidation of the principal and not towards the costs and interest was negatived.

A revision was filed by the judgment debtors in the High Court in which the order of the Trial Court was set aside. The Supreme Court held that no payment or adjustment can be recorded at the instance of a judgment debtor unless it is made in the manner provided by rule 1 of Order 21 or the payment or adjustment is proved by documentary evidence or is admitted by the decree holder. The Supreme Court held that in the absence of payment having been made in accordance with the mode prescribed or the satisfaction recorded under rule 2 the judgment debtor cannot 27 (1999) 3 SCC 80.

VBC 68 exe.appln161.09 claim the benefit of adjustment in the manner insisted upon by him. The judgment debtor, however, sought to rely on the provisions of Sections 59 and 60 of the Contract Act. The Supreme Court held that Section 59 refers to a situation where several distinct debts are payable by a person and not to various heads of one debt. The principal and interest due on a single debt or a decree based on such debt carrying subsequent interest cannot, it was ruled, be held to be several distinct debts. The law on the subject has been formulated in the judgment of the Supreme Court as follows :

> "We hold that the general rule of appropriation of payments towards a decretal amount is that such an amount is to be adjusted firstly, strictly in accordance with the directions contained in the decree and in the absence of such direction, adjustments be made firstly in payment of interest and costs and thereafter in payment of the principal amount. Such a principle is, however, subject to one exception, i.e., that the parties may agree to the adjustment of the payment in any other manner despite the decree. As and when such an agreement is pleaded, the onus of proving is always upon the person pleading the agreement contrary to the general rule or the terms of the decree schedule. The provisions of Sections 59 to 61 of the Contract Act are applicable in cases where a debtor owes several distinct debts to one person and do not deal with cases in which the principal and interest are due on a single debt."

> VBC 69 exe.appln161.09

> 51. This judgment of the Supreme Court has been reaffirmed in a subsequent judgment of a Constitution Bench in Gurpreet Singh v. Union of India28. The judgment in Industrial Credit & Development Syndicate (supra) is cited in paragraph 20 of the judgment of the Constitution Bench. The judgment of the Constitution Bench lays down that (i) though the decree holder may have the right to appropriate the payments made by the judgment debtor it could only be as provided in the decree if there is provision in that behalf in the decree; or as contemplated by Order 21 Rule

1; (ii) The code or the general rules do not contemplate payment of further interest by a judgment debtor on the portion of the principal which he has already paid. The obligation of the judgment debtor is only to pay interest on the balance principal remaining unpaid; (iii) "Of course ... out of what is paid he can adjust the interest and costs first and the balance towards the principal, if there is a shortfall in deposit."29 Having regard to the law laid down in Industrial Credit & Development Syndicate (supra) and in the subsequent judgment of the Constitution Bench in Gurpreet Singh (supra), Second Claimant

28 (2006) 8 SCC 457.

29 paragraph 49 page 483.

VBC 70 exe.appln161.09 Nos. 2 to 8 are justified in urging that the payments which have been made would have to be apportioned first between the interest and the balance towards principal since there was admittedly a shortfall in deposit.

XI Computation

52. To obviate any controversy on the mathematical calculation involved, both the learned counsel appearing on behalf of Second Claimant Nos.2 to 8 and for Jet have verified the computation of the balance due and payable by Jet to Second Claimant Nos. 2 to 8. Upon hearing the learned counsel the Court has come to the conclusion that interest should be awarded to Second Claimant Nos.2 to 8 at the rate of 9% per annum in the facts and circumstances of the case. The following calculation has been made on that basis. The computation of the amount due and payable by the Jet to Second Claimant Nos.2 to 8 is as follows :

VBC 71 exe.appln161.09 Calculation of Simple Interest on the basis of Rs.1450 Crores - Period from 31.03.2008 to 30.04.2011 (Amount in Rupees) S.No. Particulars Opening Balance Amount Paid Amount appropriated Closing Balance Due Interest Due towards interest @9% 1 Upto 31-03-2008 5,500,000,000 1,004,200,000 - 4,495,800,000 1,108,553 2 Upto 31-03-2009 4,495,800,000 875,000,000 405,730,553 4,026,530,553 404,622,000 3 Upto 31-03-2010 4,026,530,553 - - 4,026,530,553 362,387,750 4 Upto 31-03-2011 4,026,530,553 - - 4,026,530,553 362,387,750 5 Upto 30-04-2011 4,026,530,553 - - 4,026,530,553 29,785,295 (i.e. for I Month) Total 1,160,291,348 Total interest 1,160,291,348 Less Interest appropriated 405,730,553 Balance interest ig 754,560,795 Add Balance principal amount* 4,026,530,553 Aggregate amount as on April 30, 2011 4,781,091,348 Note: Further Interest on principal amount of Rs.4,02,65,30,553/- @ 9 % p.a. = Rs.9,92,843/- per day.

53. In the circumstances, the balance due and payable by Jet to Second Claimant Nos. 2 to 8 as on 30 April 2011 is Rs.

478,10,91,348/- (comprised of balance interest in the amount of Rs.75,45,60,795/- and a balance principal of Rs.402,65,30,553/-.).

Further interest on the principal amount of Rs.402,65,30,553/- at 9% per annum works out to Rs.9,92,843/- per day. Jet has deposited in Court an amount of Rs.275 Crores. This amount together with the interest accrued thereon shall be released by the Prothonotary and Senior Master to Second Claimant Nos.2 to 8.

The balance that would cover the total sum of Rs.478,10,91,348/-

VBC 72 exe.appln161.09 together with interest on the principal sum computed at Rs.

9,92,843/- per day shall be paid over by Jet to Second Claimant Nos. 2 to 8 within a period of two weeks from today. Upon making of the aforesaid payment, the attachment levied on 30 March 2009 shall stand raised and Jet shall be relieved of the undertaking furnished in pursuance of the order of the Learned Single Judge dated 31 March 2009.

54. On the conclusion of the judgment, counsel appearing on behalf of Second Claimant Nos.2 to 8 seeks continuation of the order dated 31 March 2009. The application is opposed on behalf of the First Claimant. Counsel appearing on behalf of the First Claimant states that the First Claimant has sufficient resources to meet even the enhanced payment of Rs.550 Crores in the event that in appeal it is directed to do so and that the continuation of the ad interim order is a matter of serious prejudice to the conduct of the business.

55. The ad interim order dated 31 March 2009 was passed when there was no adjudication even prima facie at that stage VBC 73 exe.appln161.09 on whether as a matter of fact Jet was liable to pay the additional consideration of Rs.550 Crores to Second Claimant Nos.2 to 8.

This Court having come to the conclusion that Jet is not liable to pay a total consideration of Rs.2,000 Crores but, that the liability is to pay a total consideration of Rs.1,450 Crores, no case has been made out for the continuation of the ad interim order. In any event, it has been directed that the attachment levied on 30 March 2009 shall stand raised only after payment of the amount found due, in the judgment of the Court, is made over by Jet to Second Claimant Nos.2 to 8.

56. In view of the aforesaid finding Execution Application 161 of 2009 is disposed of. Chamber Summons 551 of 2009, 729 of 2009 and 603 of 2010 are accordingly disposed of. Counsel appearing on behalf of Jet states that Chamber Summons 477 of 2011 will not survive in view of the judgment.

57. Notice 734 of 2009 shall stand marked as satisfied upon payment being made by Jet in terms of the directions given in this order.

(Dr.D.Y.Chandrachud, J.)