R.M. INVESTMENT AND TRADING CO. PVT. LTD. A

v.

BOEING CO. AND ANR.

FEBRUARY 10, 1994

[S.C. AGRAWAL AND M.K. MUKHERJEE, JJ.] B

Arbitration: Foreign Awards (Recognition and Enforcement) Act, 1961—Sections 2 and 3—Stay of proceedings—Commercial relationship within the meaning of section 2 should exist between the parties—Suit for non-payment of compensation arising out of such commercial relationship could be C *stayed—Stay of suit ordered by Division Bench—Trial Court has no jurisdiction to proceed with the suit in any way whatsoever including allowing amendment of plaint and addition of party—C.P.C. Order 39 Rule 1 and Order 6 Rule 17.*

Words & Phrases—'Commercial'—'Commercial Relationship'—Meaning of in the context of Section 2 of Foreign Awards (Recognition and D *Enforcement) Act, 1961.*

The petitioner Company (RMI) entered into an agreement with the Respondent - an American Company (Boeing) whereby R.M.I. agreed to E **provide consultancy services for promoting sale of Boeing aircrafts in India. The agreement was initially operative till the end of December, 1986 but was extended till 30.4.1987. The agreement contained an arbitration clause. In August, 1987 Definitive Purchase Agreements for purchase of two aircrafts were executed between Boeing and Air India. R.M.I. claimed commission from Boeing on the said transaction, but it was refused.** F **Thereupon R.M.I. filed a suit in the High Court for the recovery of U.S.$ 17.5 million by way of compensation and remuneration on the basis of its agreement with Boeing along with other incidental reliefs.**

In the said suit R.M.I. filed an application for an injunction and the G **Trial Judge passed an interim order directing that if any payment is made by Air India to Boeing a sum of U.S.$ 17.5 million shall be retained with Air India.**

Boeing moved an application for stay of the said suit on the ground that the matter was covered by the arbitration clause and it was willing to H

A do everything necessary for the proper conduct of the arbitration. R.M.I. filed an application for amending its plaint and adding Air India as a party defendant.

The Trial Judge passed an order staying the suit and all proceedings except the pending interlocutory application. Boeing moved an application B for vacating the interim order. The trial Judge dismissed the application for stay of the suit. Appeal against the said order was allowed by a Division Bench of the High Court against which R.M.I. filed the first of the three special leave petitions.

C The application for amendment of the plaint and adding Air India as a party was allowed by the trial Judge. Boeing filed separate appeals. A Division Bench allowed these appeals against which the other two Special Leave Petitions have been filed by R.M.I.

Dismissing the Special Leave Petitions, this Court

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HELD: 1. The High Court was right in holding that the agreement to render consultancy services by R.M.I. to Boeing is commercial in nature and that R.M.I. and Boeing do stand in commercial relationship with each other. While construing the expression 'Commercial Relationship' in Section 2 of the Act, aid can also be taken from the Model Law prepared by E UNCITRAL wherein relationship of a commercial nature include "commercial representation or agency" and "consulting." [845-C; 846-A]

Atiabari Tea Co. Ltd. v. *The State of Assam & Ors.*, [1961] 1 S.C.R. 809, *Fatehchand Himmatlal & Ors.* v. *State of Maharashtra etc.*, [1977] 2 F S.C.R. 828, *Renusagar Power Company Ltd.* v. *General Electric Company & Anr.*, [1985] 1 S.C.R. 432 and *Koch Nevigation* v. *Hindustan Petroleum*, [1989] Supp. 1 S.C.R. 70, relied on.

2. It cannot be said that the claim in the suit is *de hors* the consultant services Agreement and is not a claim arising under the said agreement. G [846-G]

3. Air India was not originally impleaded as a defendant in the suit and was impleaded as a party only after the filing of the application of stay under Section 3 by Boeing. Even after impleadment of Air India as a defendant the main relief in the suit is claimed against Boeing and Air H Indian has been impleaded as a defendant only to obtain discovery and

production of certain documents. If the suit against boeing has to be stayed under Section 3 of the Foreign Awards (Recognition & Enforcement) Act, 1961 it is difficult to appreciate how it could proceed against Air India alone. [847-A, B]

4. On April 19, 1993, the Division Bench of the High Court, while admitting the appeal against the order of the Single Judge dated April 5, 1993 rejecting the application for stay of the suit had passed an interim order staying the suit till the hearing of the appeal. Inspite of the said interim order the Single Judge dealt with the application for amendment and passed the order allowing the said application on July 13, 1993. The Division Bench of the High Court has, however, found that in view of the said order passed by the Court on April 19, 1993, the trial court no longer had any jurisdiction to proceed in respect of the suit in any way whatsoever and could not proceed with the hearing of the amendment application and to allow the amendment of the plaint. The Division Bench has further observed that since it was granting stay of the suit itself it was not necessary to pass any specific order in respect of any interlocutory proceeding in the suit. There is no infirmty in the said approach of the Division Bench of the High Court. [847-D, E, G, H; 848-A]

Micopri S.P.A. **v.** *Sansouci Pvt. Ltd.,* **[1982] 1 C.L.J. 511, disapproved.**

Kamani Engg. Corporation Ltd. & Ors. **v.** *Societe De Traction Et. D' Electricites Societies Anyonyme,* **A.I.R. (1965) Bom. 114, distinguished.**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 20139 of 1993.

From the Judgment and Order dated 14.10.93 of the Calcutta High Court in A.No. 295/93 (arising out of Matter No. 2352 of 1992).

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Special Leave Petition (C) Nos. 121-22 of 1994.

From the Judgment and Order dated 21.12.93 of the Calcutta High Court in A.No. 606-607/93 (arising out of Suit No. 363 of 1990).

Shanti Bhushan for the Petitioner.

The Judgment of the Court was delivered by

A **S.C. AGRAWAL, J.** 1. Since these Special Leave Petitions arise out of the same proceedings in the High Court they are being disposed of by a common order.

2. *R.M. Investment & Trading Co. Pvt. Limited* (for short "*R.M.I.*"), B the petitioner in these petitions, is a company incorporated under the Companies Act, 1956. Sometime in or around 1986, *R.M.I.* entered into an agreement with Boeing Company (for short "Boeing"), a company incorporated under the laws of the State of Delaware in the United States of America, whereunder *R.M.I.* agreed to provide Boeing with consultant services for promotion of sale of Boeing aircrafts in India. The said C agreement was initially to be operative till December 31, 1986, but by subsequent agreement it was extended till April 30, 1987. In August, 1987, Definitive Purchase Agreement for purchase of two aircrafts were executed between Being and Air India, a body corporate constituted under the Air Corporation Act, 1953. *R.M.I.* claimed commission from Boeing on D the said transaction but Boeing refused to pay the same the thereupon in April, 1990, *R.M.I.* filed a [Suit no. 363 of 1990] on the Original Side of the Calcutta High Court against Boeing for the recovery of U.S. $ 17.5 million equivalent to Rs. 10,07,12,500,00 by way of compensation and remuneration on the basis of the terms of Consultant Services Agreement alongwith other incidental reliefs. The Consultant Services Agreement contains (in para- E graph 10) an arbitration clause which provides that "any controversy or claim arising out of or relating to this agreement, or any breach thereof, which the parties have not been able with due diligence to settle amicably, shall be settled by arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association." In the said F suit *R.M.I.* filed an application for injunction and an interim order was passed by a learned single Judge of the High Court on July 17, 1992, whereby it was directed that if any payment is made by Air India to Boeing, Boeing shall retain a sum of U.S. $ 17.5 million with Air India. On August 13, 1992, Boeing moved an application under section 3 of the Foreign Awards (Recognition & Enforcement) Act, 1961 (hereinafter referred to G as the 'Act') for the stay of the said suit on the ground that the subject matter of the suit was covered by the arbitration clause and that Boeing was willing to do everything necessary for the proper conduct of the arbitration. On the same date *R.M.I.* filed an application for amendment of the plaint and for addition of Air India as a party defendant to the suit. H On August 14, 1992, learned trial Judge passed an order staying the suit

and all proceedings except the pending interlocutory application. On August 18, 1992, Boeing moved an application for vacating the interim order passed on July 17, 1992. By order dated April 5, 1993, the learned trial Judge dismissed the application filed by Boeing for staying the suit. Boeing filed an appeal [Appeal no. 295 of 1993] against the said order of the learned trial Judge. The said appeal has been allowed by a Division Bench of the High Court by judgment dated October 14, 1993. Special Leave Petition (Civil) No. 20139 of 1993 is directed against the said judgment of the Division Bench of the High Court.

3. By order dated July 30, 1993, the application for amendment as well as for addition of Air India as a party was allowed by the learned trial Judge. Boeing and Air India filed separate appeals [Appeal nos. 606 & 607 of 1993 respectively] against the said order of learned Judge. Both the appeals have been allowed by a Division Bench of the High Court by judgment dated December 21, 1993. Special Leave Petitions (Civil) Nos. 121-22 of 1994 are directed against the said judgment of the Division Bench of the High Court.

4. We have heard Shri Shanti Bhushan, the learned senior counsel appearing for *R.M.I.,* and Shri N.A. Palkhivala and Shri N.N. Gooptu, learned senior counsel appearing for Boeing and Air India respectively.

5. We will first take up Special Leave Petition (Civil) No. 20139 of 1993 which is directed against the judgment dated October 14, 1993, whereby the application filed by Boeing under section 3 of the Act has been allowed and the proceedings in the suit filed by *R.M.I.* have been stayed. In the said Judgment the Division Bench of the High Court has held that that in view of the definition of the expression 'foreign award' contained in section 2 of the Act, a suit cannot be stayed under section 3 unless the Court is satisfied that the parties to the arbitration agreement stand in such legal relationship to each other which can be considered as "commercial". The learned Judges have construed the word "commercial" in the light of the decisions of this Court in *Atiabari Tea Co. Ltd.* v. *The State of Assam and Ors.,* [1961] 1 S.C.R. 809 and *Fatehchand Himmatlal & Ors.* v. *State of Maharashtra Etc.,* [1977] 2 S.C.R. 828, and the Model Law Prepared by UNCITRAL and have held that "the transaction between *R.M.I.* and Boeing is commercial and they do stand in commercial relationship" and, on that view, it has been held that the suit is liable to be stayed

A under section 3 of the Act since the conditions required to be fulfilled for the application of section 3 as indicated by this Court in *Renusagar Power Company Ltd.* v. *General Electric Company & Anr.*, [1985] 1 S.C.R. 432, are fulfilled in the case.

6. Shri Shanti Bhushan has urged that the learned Judges of the B High Court have erred in holding that the Consultant Services Agreement between *R.M.I.* and Boeing is in the nature of a commercial contract. According to Shri Shanti Bhushan a commercial contract is mercantile in nature involving sale and purchase of goods and a service agreement providing for rendering consultancy services cannot be treated as a com- C mercial agreement. In support of the aforesaid submission Shri Shanti Bhushan has placed reliance on the decision of a learned single Judge of the Calcutta High Court in *Micopri S.P.A.* v. *Sansouci Pvt. Ltd.*, [1982] 1 CLJ 511, and the decision of the Bombay High Court in *Kamani Engineering Corporation Ltd. & Ors.* v. *Societe De Traction Et. D' Electricites Societies Anyonyme,* A.I.R. (1965) Bom. 114.

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7. Before we consider the meaning to be assigned to the word "commercial" in Section 2 of the Act, we would briefly refer to the terms of the agreement between *R.M.I.* and Boeing. In the said agreement *R.M.I.* has been described as 'consultant'. Under the heading 'Recitals', in the E agreement, it is stated:

> "A. Boeing desires to engage Consultant to.
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> (i) Provide assistance in promoting the sale within India (the "Territory") of new Boeing Model 737, 747, 757 and 767 type F air craft and Boeing owned used aircraft (hereinafter referred to individually and collectively as "Aircraft") to Customers and
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> (ii) Assist Boeing in concluding contracts for the sale of such Aircraft.
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> B. Consultant desires to promote such sales and render such assistance and represents that consultant has the resources and experience necessary to do so effectively."

8. Under the heading 'Agreements' in paragraph 2 dealing with H 'Service of Consultant and Sale of Aircraft' it is stated:

"2.1. During the term of this agreement and strictly subject to the limitations of paragraph 3, Consultant shall: A

(a) use consultant's best efforts to promote the sale (as defined in paragraph 2.2.) of Aircraft to customers;

(b) promptly inform Boeing whenever a Customer is interested in discussing the purchase of Aircraft, and at Boeing's request, arrange to bring Boeing and such Customer together for negotiations; B

(c) provide any cultural, *commercial* and managerial assistance and information which may be helpful to Boeing's Sales efforts with Customers. C

(d) render such assistance as Boeing may reasonably require in concluding contracts with customers for the sale of Aircraft; and D

(e) maintain whatever organisation and resources are reasonably necessary for providing the aforementioned services." (emphasis Supplied)

9. In paragraph 3 relating to 'Representations' and Obligations of Consultant' it is stated: E

"3.2. Consultant shall assume for its own account and shall pay all costs, expenses and charges necessary or incidental to Consultant's operations hereunder." F

Among the 'Obligations of Boeing' as mentioned in paragraph 4 is the obligation:

"(a) to furnish Consultant from time to time with such promotional data and other information as Boeing deems necessary for the performance of Consultant's obligations under this Agreement; and G

(b) to pay Consultant compensation for Consultant's performance of this Agreement in the amount and under the circumstances described in paragraphs 5 and 8 herein; provided, however, if any H

A Customer or any Relevant Government prohibits or limits in any manner the amount of compensation which may be paid to Consultant pursuant to this Agreement, then notwithstanding any other provision in this Agreement to the contrary, Boeing shall not be obligated to pay Consultant any compensation in excess of such prohibition or limitation. In no event shall Boeing be obligated to B pay Consultant any more compensation than that specified in paragraph 5."

10. In paragraph 5.1. the following provision is made for payment of compensation to consultant:

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"(a) an annual retainer in the amount of United States Dollars Four Hundred Twenty Thousand (U.S. $ 420,000). Such amount shall be paid to Consultant by Boeing in equal quarterly payments. Such quarterly payments shall be made by Boeing commencing on April 1, 1986 with subsequent payments made in three (3) month D intervals thereafter; provided, however, if the date of execution of this Agreement is less than thirty (30) days prior to or is after the date any quarterly payment is due then any such payment shall be made within thirty (30) days after such execution date;

E (b) for the Sale of each Aircraft made during the term of this Agreement an amount in United States Dollars equal to five percent (5%) times the invoiced purchase price of such Aircraft as determined pursuant to the purchase agreement therefor;

(c) Compensation to Consultant pursuant to paragraph 5(b) for F the Sale of Aircraft shall be reduced by the retainer amount theretofore paid to Consultant under paragraph 5.1. (a) and by any retainer amounts yet to be paid to Consultant pursuant to said paragraph 5.1.(a).

G (d) Consultant shall not receive compensation on the sale of any special equipment or training which are not included in the purchase price for such Aircraft, nor on the spare parts of spare engines."

11. From the terms of the Agreement referred to above it appears H that *R.M.I.* rendered consultancy services to Boeing as an independent

contractor. The said services were for promoting the sales of new Boeing Model 737, 747, 757 and 767 types of aircrafts in India and to assist Boeing in the sale of such aircrafts. While *R.M.I.* was entitled to payment of compensation for such services, the costs, expenses and charges necessary or Incidental to *R.M.I.'s* operations were to be borne by *R.M.I.*

12. It is not disputed that the sale of aircrafts by Boeing to customers in India was to be a commercial transaction. The question is whether rendering of consultancy services by *R.M.I.* for promoting such commercial transaction as consultant under the Agreement is not a "commercial transaction." We are of the view that the High Court was right in holding that the agreement to render consultancy services by *R.M.I.* to Boeing is commercial in nature and that *R.M.I.* and Boeing do stand in commercial relationship with each other. While construing the expression "commercial" in Section 2 of the Act it has to be borne in mind that the "Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction." [See : *Renusagar Power Co. Ltd.* v. *General Electric Co. & Anr.*, [1985] 1 S.C.R. 432, at p. 492 and *Koch Nevigation* v. *Hindustan Petroleum*, [1989] Supp. 1 S.C.R. 70, at p. 75.] The expression "commercial" should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today.

13. In the context of Article 301 which assures freedom of trade, commerce and intercourse, it has been held:

> "Trade and commerce do not mean merely traffic in goods, *i.e.*, exchange of commodities for money or other commodities. In the complexities of modern conditions, in their sweep are included carriage of persons and goods by road, rail, air and waterways, contracts, banking, insurance, transactions in the stock exchanges and forward markets, *communication of information*, supply of energy, postal and telegraphic services and many more activities - too numerous to be exhaustively enumerated which may be called commercial intercourse." (Emphasis Supplied)
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> (*Atiabari Tea Co. Ltd.* v. *The State of Assam & Ors.*, [1961] 1 S.C.R. 809, at p. 874, Shah, J.)

A 14. While construing the expression 'commercial relationship' in Section 2 of the Act, aid can also be taken from the Model Law prepared by UNCITRAL wherein relationships of a commercial nature include "commercial representation or agency" and "consulting".

15. In *Micoperi S.P.A.* v. *Sansouci Pvt. Ltd.,* (supra) a learned single B Judge of the Calcutta High Court has construed the term "commercial" in the light of the provisions contained in Rule I of Chapter XII of the the Rules of the Original Side of the Calcutta High Court which specifies the nature of suits covered by the expression "commercial suits." We do not find any reason for thus restricting the meaning of the term "commercial" C in Section 2 of the Act on the basis of the provisions contained in the Rules of the High Court.

16. *Kamani Engineering Corporation,* case (supra) related to a contract for technical assistance in electrification of railways and in that case D it was found that the said contract did not involve the consultant into business and/or any contracts of the plaintiffs and they had kept themselves out of any commercial relations with the plaintiffs. The said decision has, therefore, no application to the facts of the present case.

17. In the present case, on the other hand, the consultant (*R.M.I.*) E was required to play an active role in promoting the sale of the aircraft of Boeing to customers and was required to provide "commercial and managerial assistance and information which may be helpful to Boeing's sales efforts with customers." This would show that relationship between *R.M.I.* and Boeing was commercial in nature.

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18. Shri Shanti Bhushan has, however, urged that since the agreement between Boeing and Air India was executed after the Consultant Services Agreement had expired on April 30, 1987, the claim made by *R.M.I.* in the suit cannot be said to be a claim arising under the said Agreement. We have been taken through the plaint of the suit and we are unable to hold G that the claim in the suit is *dehors* the Consultant Services Agreement and is not a claim arising under the said agreement.

19. Shri Shanti Bhushan has also contended that the suit has been filed against boeing as well as Air India and that even if the suit is liable H to be stayed under Section 3 of the Act it could only be stayed as against

Boeing and it should have been allowed to proceed against Air India. We, however, find that Air India was not originally impleaded as a defendant in the suit and was impleaded as a party only after the filing of the application of stay under Section 3 by Boeing. Even after impleadment of Air India as a defendant the main relief in the suit is claimed against Boeing and Air India has been impleaded as a defendant only to obtain discovery and production of certain documents. If the suit against Boeing has to be stayed under Section 3 of the Act it is difficult to appreciate how it could proceed against Air India alone.

20. In the circumstances, we find no merit in S.L.P. (Civil) No. 20139 of 1993 and the same is liable to be dismissed.

21. Coming to S.L.P. (Civil) Nos. 121-22 of 1994 which are directed against the judgment of the Division Bench of the High Court dated December 21, 1993, setting aside the order of learned single Judge allowing the application for amendment of the plaint as well as the impleadment of Air India as defendant, we find that on April 19, 1993, the Division Bench of the High Court, while admitting Appeal number 295 of 1993 against the order of the learned single Judge dated April 5, 1993 rejecting the application for stay of the suit under Section 3 of the Act, had passed an interim order in the following terms:

> "there shall also be an order of stay of the suit being No. 363 of 1990 (*R.M.I.*) till the hearing of the appeal."

22. Inspite of the said interim order the learned single judge dealt with application for amendment and passed the order allowing the said application on July 13, 1993. The only contention that was urged before the Division Bench of the High Court was that the interim order dated April 19, 1993, did not preclude the learned single Judge from dealing with the application for amendment and that he was competent to pass interlocutory orders in the suit. The Division Bench of the High Court has, however, found that in view of the said order passed by the Court on April 19, 1993, the trial Court on longer had any jurisdiction to proceed in respect of the suit in any way whatsoever and could and proceed with the hearing of the amendment application and to allow the amendment of the plaint. The Division Bench has further observed that "no specific order

staying the hearing of the amendment application was passed by the Court for the reason that the Court was granting stay of the suit itself and it is not necessary to pass any specific order in respect of any interlocutory proceeding in the suit." We do not find any infirmity in the said approach of the Division Bench of the High Court. S.L.P. (Civil) Nos. 121-22 of 1994 are also liable to be dismissed.

23. In the result all the three special leave petitions filed by the petitioner (*R.M.I.*) are dismissed.

G.N. Petitions dismissed.