AIR 1978 BOMBAY 106*

MRIDUL. J.

Indian Organic Chemicals Ltd. etc., Petitioners v. Chemtex Fibres Inc. and others etd., Respondents.

Arbitration Petns. Nos. 72, 73, 88 to 90 of 1976 and L.C. Suit No. 199 of 1976 along with Notices of Motion Nos. 452 to 454 of 1976, D/-4-4-1977.

(A) Foreign Awards (Recognition and Enforcement) Act (45 of 1961), S. 2- Concept of commercial relationship- Scope.

The Statement of objects and Reasons of the Act shows that the Act seeks to achieve speedy settlement of disputes through arbitration. The Act is a successor to the Arbitration (Protocol and Convention) Act, 1937. The former Act was intended to effectuate the the purposes of the Geneva Convention of 1927. There is no escape from the conclusion that the said provisions of the Conventions and said Acts are calculated and designed to subserve the cause of facilitating international trade or promotion thereof. An expression occurring in such statutes, therefore, must receive, consistent with its literal and grammatical sense, a liberal construction. Therefore, the concept of commercial relationship in S. 2 takes within its ambit all relationships which arise out of or are ancillary and incidental to the business dealings between citizens of two States. The concept takes within its fold all legal relationship pertaining to the international trade in all its forms between the citizens of different States.

(B) Foreign Awards (Recognition and Enforcement) Act (45 of 1961). Ss. 3, 2- Applicability - For application of S. 3, an agreement must be commercial not as normally understood but by virtue of provisions of lawin force in India.

The expression occurring in S. 2 is 'legal relationships, whether contractual or not, considered as commercial under the law in force in India'. It, therefore, follows that not only should the relationship be commercial but such a relationship should be considered as commercial under the law in force in India'.

*Only portions approved for reporting by High Court are reported here.

The use of word 'under' is deliberate and predicates coverage. In legal parlance the word 'under' connotes 'by virtue of'. It therefore follows that in order to invoke the provisions of S. 3 it is not enough to establish that an agreement is commercial. It must also be established that it is commercial by virtue of a provision of law or an operative legal principle in force in India. If the expression "commercial relationship" is interpreted as normally understood in the legal parlance, it would render the words "under the law in force in India" nugatory.

(C) Foreign Awards (Recognition and Enforcement) Act (45 of 1961), S. 3- "Agreement incapable of being performed" - Conflicting awards would not render arbitration agreement incapable of performance.

(D) Foreign Awards (Recognition and Enforcement) Act (45 of 1961), S. 3 "An agreement" - S. 3 has no application to a case of plurality of arbitration agreements.

Section 3 has no application to a situation where plurality of agreements converge on disputes and differences which arise out of a single transaction or a series of transactions which are inextricably linked with each other. This interpretation of the provisions of S. 3 is in consonance with the intendment, purposes and scheme of the Act which is calculated to provide for speedy and effectual settlement of international disputes arising out of international trade. The complications which normally arise from the applicability of the principles of Private International Law by reason of plurality of agreements impinging on a dispute will result in a very unsatisfactory situation. It will not only complicate the matters but will also fail to resolve the conflict that may arise as a result of the application of multifarious and often conflicting principles of Private International Law to a particular set of disputes. Therefore S. 3 has application only to a case where there exists one agreement which provides for a particular arbitral forum and a suit is commenced by a party to such an agreement or by a person claiming through him in respect of a matter which is covered by such an agreement. Any other interpretation would make its machinery unworkable and thus defeat the purposes sought to be subserved by the provisions of the Act.

A.K. Sen with J.C. Bhatt, R.J. Joshi and G. E. Vahanvati, for Petitioners; in Arbitration Petn. Nos. 72 and 73 of 1976; and for Respondents in Arbitration Petn. Nos. 88 to 90 of 1976; M.H. Shah with A. M. Setalvad (for No.2) and M.H. Shah with S.P. Bharucha (for No.3) for Respondents, in Arbitration Petn. Nos. 72 and 73 of 1976; Advocate General with M.H.Shah, A.M. Setalvad and S.P. Bharucha for Petitioners; in Arbitration Petn. Nos. 88 to 90 of 1976 and for Respondents in Arbitration Petn. Nos. 72 and 73 of 1976.

ORDER:- 1 to 23 .....

24. Shri M.H. Shah the learned Counsel for the defendants contends that the agreements between the plaintiffs and the defendants are the agreements which come within the purview of the 1961 Act and that the claims of the plaintiffs in the suit are matters which have been agreed to be referred to arbitration by virtue of and under the arbitration clauses contained in the said agreements. Consequently, the learned Counsel claims that under S. 3 of the 1961 Act the suit is liable to be stayed. The learned Counsel emphasises the peremptory character of the legislative injunction in S. 3 and submits that the Court has no option but to grant stay of the proceedings. Shri A.K. Sen, the learned Counsel for the plaintiffs, argues that the provisions of S. 3 of the 1961 Act are not attracted in the present case. The conflict will have to be resolved with reference to the relevant provisions of law seen in the context of the facts of the present case.

25. The 1961 Act gives effect to the Convention on recognition and enforcement of arbitral awards adopted at New York on 10th June 1958. The said Convention was verified by India and deposited with the Secretary General of the United Nations on 13th July 1960. The 1961 Act is intended inter alia to provide for speedy settlement of disputes through arbitration by removing the constraints to which such settlements were subjected to by the provisions of the Indian Law. Section 2 of the 1961 Act by its material provision defines a foreign award as "an award on differences between persons arising out of legal relationship considered commercial under the law in force in India", provided it is made on and after 11th Oct. 1960 and provided further that it is in pursuance of an agreement in writing to which convention

set forth in the Schedule to the said 1961 Act applies and is made in one of territories notified by the Central Government to be the territories to which the said convention applies. There is no said S. 2 United States of America has been notified by the Central Government as one of the territories to which the said Convention applies. It is also not disputed that although not on the day when these proceedings were adopted but on the day when the matter was heard by me the United Kingdom was declared to be such a territory under a notification issued by the Government of India in that behalf. The Convention annexed to the said 1961 Act comprises of several Articles. Articles 1 and 2 are materidl. Clause (i) of Art. 1 contemplates applicability of the Convention to the recognition and enforcement of arbitral awards made in the territory of a State other than the States where the recognition or enforcement of such awards is sought: the awards 'arising out of differences between persons whether contractual or not'. The said clause further provides that it shall apply to all awards as are not considered domestic awards under the Municipal law of the land. Clause (ii) and (III) of the said Article are not material and may be omitted. Clause (i) of Art. 2 is of significance and provides that each contracting State shall recognise the agreement in writing under which parties under_take to submit to arbitration all or any disputes which have arisen or which might arise between them in respect of defined legal relationship, whether condefined legal relationship, whether contractual or not concerning a subject matter capable of settlement by arbitration. Clause (iii) of Art. 2 ordains that a Court of contracting State, when seized of an action in the matter in respect of which ~~the meaning of the said Art. 2~~ parties have made an agreement within the meaning of the said Art. 2, shall at the request of the parties refer parties to arbitration, unless the Court finds that the said agreement is ~~f~~ null and void inoperative and incapable of being performed.

26. Section 3 of the 1961 Act, prior to its amendment in 1973, inter alia used the expression "a party to a submission made ~~xxx~~ in pursuance of an agreement to which the Convention set forth in the Schedule" applied. In V/o. Tractoroexport v. Tarapore & Co., AIR 1971 SC 1, the Supreme Court noticed the hiatus between language

of the Convention and the aforesaid expression used by the Legislature in S. 3 of the 1961 Act. In the view of the Supreme Court, in consonance with its majority decision, unless there was a submission, the of the said section did not apply notwithstanding the undisputed existence of the factum of an arbitration agreement contemplated by the said S. 3 of the said 1961 Act. With a view to nullifying the effect of the Supreme Court judgment and to bring the provisions of the said S. 3 in accord with the objectives of the Convention, the Foreign Awards (Recognition and Enforcement) Amendment Act, 1973, was enacted. By S. 2 of the said Amendment Act, S. 3 of the 1961 Act was substituted. The said S. 3 substituted the expression an "agreement to which the Art. 2 of the Convention set forth in the schedule applies" in place of the expression" to a submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies." The effect of the amend, however, need not be considered in the present case, in as much as, if the other ingredients postulated by the said S. 3 are satisfied, it will have to be held that the defendants are entitled to the stay of the proceedings notwithstanding that in point of fact no actual submission in pursuance of the arbitration agreement has been made by the parties.

27. The amended S. 3 of the 1961 Act read as under:

"3. Stay of proceedings in respect of matters to be referred to arbitration: Notwithstanding anything contained in the Arbitration Act, 1940, or in the Civil P.C. 1908, if any party to an agreement to which Article II of the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the Agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall made an order staying the proceedings."

28. Section 3 enumerates conditions which have to be fulfilled before it can be made applicable. It also provides exceptions. The Court has to be satisfied that the conditions mentioned in the section are fulfilled. The Court has to be satisfied that none of the getaways such as the agreement being null and void or being inoperative or incapable of being performed are available to the party which initiated the proceedings. If these essentials are satisfied, then, upon the plain intendment of the section buttressed by the use of the permptory word "shall", the Court has of necessity to grant stay of the proceedings. S. 3 however takes its colour from th other relevant provisions of the Act.

29. A combined reading of S. 2 of 1961 and the provisions of Arts. 1 and 2 of the Convention throws up further conditions that have to be satisfied before a party can be said to be entitled to stay under section 3. The upshot of the provisions of S. 2 read with the ter of the Convention are the four conditions viz., (i) that the difference must be out of legal relationship considered 'as commercial under the law in force in India', (ii) that the award relating to the said differences should be made on or after 11th Oct. 1960; (iii) that the award is made in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies; and (iv) that the award should be made in such territories as the Central Government by notification declares to be territories to which the convention applies. It is undoubtedly true that the provisio of the said S. 2 and the terms of the Convention emphasise the award aspect of the matter, but there is no gainsaying the legal position that an arbitration agreement takes it colour from 'foreign award' as defined in S. 2. Such an agreement must be the one which gives rise to a foreign award within the meaning of S. 2. In order, therefore, to sustain the attractability of S. 3, an arbitration agreement must also fulfil mutatis mutandis the attributes postulated by the said S. 2 and the terms of the Convention.

30. Section 3 establishes that in order that the section be attracted essential pre-requisites to be fulfilled in that behalf are (i) that there must be an agreement to which Art. 2 of the Convention set forth in the Schedule applies; (ii) that a person

who is a party or a privy to such an agreement or a person claiming through him commences a legal proceeding in any Court against the other party to the said agreement; (iii) that the proceedings commenced are in respect of a matter which is agreed to be referred to arbitration in such an agreement; (iv) that the adversary in the said proceedings has not filed any written statement or has not taken any other step in proceedings before making an application for the stay of the proceedings under the said section. On these requisites being satisfied, the Court has a mere Hobsons' choice, subject, however, to the escape routes provided by the getaways, viz., that the agreement is null and void or is inoperative or is incapable of being performed or that the dispute is not the one "with regard to the matter agreed to be referred".

31. There is no controversy between the parties that of the conditions enumerated above, several are fulfilled in the present case. The parties, however, join issues in regard to the conditions as to the commercial nature of the transaction; commercial under the provisions of a law in force in India; as to the subject-matter being go rned by the arbitration clauses contained in the agreements. In addition to the said issues, a further aspect will also have to be considered, viz., as to whether S. 3 has application to a case of plurality of arbitration agreements. Before dealing with the contentions, the factual framework may be analysed and appreciated.

32. There is no controversy between the parties that all the three agreements which are Exs. A, B and C to the plaint in Suit No. 199 of 1976 were executed at New York. Thus, the execution of the agreement was outside India. The place of execution provides a connecti factor attracting the principles of private international law prevalent under the American legal system. Ex. A is the agreement between the plaintiffs and defendants 1. The agreement inter alia recit that the plaintiffs agreed to purchase from the defendants 1 and the defendants 1 agreed to sell " certain necessary machinery and equipment, certain technical designs, drawings, manuals, written specifications and certain other documents and technical data all the foregoing to be imported into India", by the plaintiffs. Article I of the said agreement articulates the statement of project. It lays down that the project envisaged is for the establishment of facility

by the plaintiffs in India "with stipulated capacity for the manufacture of commercial sale of 6100 Metric tonnes of Rx Polyester Staple Fibre per annum" including the facility for production of Polycondensation and Ethylene Glycol. Article II of the agreement enumerates the duties and functions of the defendants 1. Besides the supply of machinery, Cl. (a) of the said Article provides for supply of technical data. Clause (b) specifies the obligations of the defendants 1. The said obligations inter alia include preparation and delivery of general kxx layout drawings for proposed installations, general equipment specifications and detailed engineering drawings for the machinery and equipment to be installed and for procuring and furnishing of machinery set forth in the annexure to the said agreement. The obligations of the defendants 1. therefofe are not merely circumscribed to the selling of the machinery by them to the plaintiffs. They also embrace the obligations to provide for technical information and data relating to not only the machinery and equipment but also for the installations to be made in connection therewith. Consideration for the= said agreement is specified in Art. V. All the terms of Art. V. need not, however, be noticed. The material stipulatio in the cl. (3) (b) thereof inter alia provides that a part of the price would not be payable to the defendants but shall be kept in escrow with a Bank to be released only after "successful test run" is held pursuant to the agreement between the plaintiffs and the defendants 2. It may also be noticed that the entire consideration payable to the defendants 1 is not entirely in cash. It is partly in kind. Sub-clauses (c), (d) and (e) of cl. (b) contemplate allotment of equity shares by the plaintiffs to the defendants 1. The Arbitration clause between the paties is contained in Art VIII. The arbitration clause inter alia provides for "arbitration in London, England" and to "be governed by the rules of the International Chamber of Commerce, Paris, France" and further that "the provisions of the Indian Arbitration Act, 1940, shall apply, save and except that where the rules of the said International Chamber of Commerce conflict with the Indian Arbitration Act. 1940, the said rules of the International Chamber of Commerce shall prevail".

33. Ex. B. is the agreement between the plaintiffs and the defe dants 2. Under the said agreement, the defendants 2 have to supply to the plaintiffs "certain necessary machinery and equipment,

technical designs, drawings, flow sheets, manuals written specifications and other documents and technical data, information and services required for the erection in India and equipping and start-up of the plant" by the plaintiffs for the manufacture of the products specified therein. One of the recitals of the said agreement establishes that the supply of the said machinery and equipment and the technical data or documents is in connection with and "required for the implementation ofthe project" contemplated in the agreement between the plaintiffs and the defendants 1. Article I of the said agreement expresses the statement of the project and is similar to the statement to be found in the agreement between the plaintiffs and the defendants 1. Article IIenumerates inter alia for supplying to the plaintiffs " all machinery and equipment" mentioned in the exhibit to the said agreement. The other clauses of the said Article oblige the defendants 2 to prepare and deliver to the plaintiffs various drawings, engineering and process flow sheets, technical data and information in regard to the said project. The range of the technical information and data to be supplied by the defendants 2 to the plaintiffs is a very wide one. It embraces not only the designs and technical data with regard to the raw materials or installation of the plant or the working of the various items of machinery and equipment but also the information and new research development of the "Chemtex Group of Companies in Technology of Polyester Staple Fibre Production". It is also one of the duties of the defendants 2 under the terms of the said Article to provide training facilities to the expert engineers or technicians designated by the plaintiffs as also to provide services of the technicians "for supervising erection of plant, start-up and plant operation until test-run" thereof on such terms as may be agreed upon between the parties and approved by the Indian Government. Article V of the said agreement provides for test runs: the alleged defaults of the defendants of the stipulations relating thereto being the principal contention between the parties in suit. Article VI provides for the warranties. The terms of the said Article have relevance not to the controversies on the present application but to the controversies on merits in the suit or in the arbitral reference. Article VII is of importance. It contains a secrecy clause and obliges the plaintiff to keep secret and treat as strictly confidential and to use solely for the purposes of the said project all " designs, drawings, plans, specifications, processes, technical data and information" which might be supplied to the plaintiffs by the defendants 2. The arbitration

clause is in Article VIII. By its material terms the clause contemplates "arbitration in India" to "be governed by the rules of International Chamber of Commerce, Paris" and further that "the provisions of Indian Arbitration Act, 1940, shall apply, save and except that where the rules of the said International Chamber of Commerce conflict with the Indian Arbitration Act 1940., the said rules of the International Chamber of Commerce shall prevail". Ex. C. is the agreement between the plaintiffs on the one hand and all the three defendants on the other. The agreement is captioned "Four Party Agreement". The recitals to the agreement show that the defendants 1 and 2 are the subsidiaries of the defendants 3 and that the defendants are vitally interested in the business and affairs of the defendants 1 and 2. The recitals further show the nexus between the four party agreement and the two agreements made between the plaintiffs and the defendants 1 and 2 respectively, the agreements being for the purposes of erection in India of a Polyester Plant. There is no statement of the project in the said agreement as is to be found in the agreements Exs. A and B. that, howev is not necessary, because, as will be seen presently, the four party agreement is an agreement of gaurantee and indemnity. Clause 2 of the agreement provides for the guarantee by the defendants 3 of fulfilment and performance by the defendatns 1 and 2 of their respectiv obligations under the said two agreement Exs. A and B. Clause 3 provides for the liability upto the aggregate amount of Rs.50,00,000/- in respect of breaches which might be committed by the defendants 1 and 2. The liability to the extent of the said Rs.50,00,000/- extends not merely to the defendants 3. It also extends mutatis mutandis to the defendants 1 and 2. In other words, Cl. of the said agreement postulate that not only are the defendants 3 liable for the breaches which might be committed by either defendants 1 or defendants 2 or both of them, but that the defendants 2 are also liable for the breaches committed by the defendants 1 of their obligations under their agreement with the plaintiffs and similarly the defendants 1 are liable for the breaches that might be committed by the defendants 2 of their obligations under their agreement with plaintiffs.

34. A synthetic analysis of the three agreements clearly establishes the indivisible or the inextricable character of the said three agreements. A common streak of the project that has to be

served by the said three agreements runs through all the said agreements There is not only interlinking between the said three agreements but there is also an interlacing of various essential terms of the said agreement. Under Ex. A a part of the consideration is not payable to the defendants 1 unless the defendants 2 fulfil their obligations in regard to the test runs postulated by the agreement between the plaintiffs and the defendants 2. The defendants 2 have to supply the technical information or equipments for machinery etc. to be supplied by defendants 1. The defendants 2 have to take into consideration the nature of the equipment or plant and machinery to be supplied by the defendants 1. The defendants 3, as the recitals in the agreement show, are vitally interested in the business affairs of the defendants 1 and 2. The defendants 3 gurantee the performance of their respective obligations by the defendants 1 and 2. Not only that, even the defendants 1 and 2 gurantee respectively the performance by each one of them of the other's obligations under their respective agreement. The provisions of the said three agreements telescope into each other so as to provide a unified project or a composite set of rights and obligations subserving the fundamental objective of establishing in India by the plaintiffs of "facilities" with a stipulated capacity " for manufacture for commercial sale of 6100 Metric tonnes of Polyester Staple Fibre per annum" as also for manufacture of "polycondensation starting from DMT (Dimethyl Terephthalate) and Ethylene Glycol. It is in this context that the contention of the learned counsel Shri A.K. Sen will have to be upheld that the said three agreements unfold a consolidated project for the establishment of the said facilities. I find substance in the further contention of the learned counsel to the effect that having regard to the interlinking of the rights and obligations of the parties or to the consolidated character of the project catered by the said agreements the suit in respect of the plaintiffs' claim in that behalf had to be one, a consolidated suit embracing all the claims of the plaintiffs against the defendants either jointly or severally.

35. The word "commercial" means pertaining to commerce. The Webster's Third New International Dictionary at page 456 gives the meaning of the word 'commercial' as "of in, or relating to as a: occupied with or engaged in commerce (a - establishment)(the - world)

be: related to or dealing with commerce (-treaty)". Etymologically, therefore, the expression 'commercial relationship' taking its colour from the ward'commerce' cannotes a relationship arising out of commerce. The word 'commerce' according to Jowitt's Dictionary of English Law means "the intercourse of nations in other's produce and manufactures, in which the superfluities of one are given for those of another, and then re-exchanged with nations for mutual wants. Commerce strictly relates to dealings with foreign nations, colonies, etc., trade, to mutual dealings at home". The word 'commerce', several reported judgments show, is a word of a very wide import. In Welton v. Missouri, (1875) 91 US 275, Field, J., speaki ng for the Supreme Court of the United States of America, observed at page 280 as follows:

"Commerce is a term of the larges import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States:.....".

In Automobile Transport Ltd. v. State of Rajasthan, AIR 1962 SC 1406, Hidayatulla J. (as he then was) referred at page 1445 to the classic definition of 'commerce' given by Marshall, C.J. in Gibbons v. Ogden, (1824-9 Wheat 1) in the following words:-

"In 1834, in the well-known case of (1824) 9 Wheat 1, this clause was considered. Marshall, C.J. gave the definition of Commerce:

'Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse' ".

36. In view of the wide amplitude of the concept, Courts have generally given an extended meaning to the work 'commercial'. In M.'Kay v. Rutherford, (1848) 6 Moo. PC. 413 at p. 424, Compbell J. observed.

"Wherever capital is to be laid out on any work, and a risk run of profit or loss, it is a commercial venture".

37. Similarly, a contract with a Canal Comapny for supplies of stone for making of a Canal was considered to be a commercial matter. (See Forget v. Baxter, 1900 Ac 467). An Incorporated Canal Comaphy whose profits were made out of the stalls constructed by it was held to be a commercial company. (See Re Warwick & Napton Canal Co. 7 DGM & G 199.n.).

38. In Jordan v. Tashro, (1928) 278 US 123, the Supreme Court of the United States of America was required to consider whether a hospital which was run as a business undertaking could be said to be an undertaking for commercial purpose within the meaning and for the purposes of the Alien Land Law of California. Stone, J. delivering the opinion the word 'commerce' or 'commercial' in its narrower and wider sense in the following words at page 127:-

"While in a narrow and restricted sense the terms 'commerce', or 'commercial' and 'trade' may be limited to the purchase and sale or exchange of goods and commodities, they may connote, as well, other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise. Asakurs v. Seattle; (1923)265 US. 332). And although commerce includes traffic in this narrower sense for more than a century it has been judicially recognized that in broad sense it embraces every phase of commercial and business activity and intercourse. See Gibbons v. Ogden, (1824) 9 Wheat 1. 189: 6 L. ed. 23, 68.".

The learned Judge then referred to the canon of constuction that, to the words "in treaties" where obligations to foreign countries are involved, wider interpretation has to be given. The learned Judge at page 128 held as follows:-

"Giving to the terms of the Treaty, as we are required by accepted principles, a liberal rather than a narrow interpretation, we think, as the State Court held that the terms 'trade' and 'commerce' when used in conjunction with each other and with the grant of authority to lease land for 'commercial purposes' are to be given a broader significance than that pressed upon us, and are sufficient to include the operation of a hospital as a business undertaking; that this is a commercial purpose for which the Treaty authorizes Japanese subjects to lease lands".

39. The 1961 Act is enacted to effectuate the purposes of New York Convention. The Statement of objects and Reasons of the Act shows that the Act seeks to achieve speedy settlement of disputes through arbitration. The Act is a successor to the Arbitration (Protocol and Convention) Act, 1937. The former Act was intended to effectual the purposes of the Geneva Convention of 1927. There is no escape from the conclusion that the said provisions of the conventions and said Acts are calculate and designed to subserve the cause of facilitating international trade or promotion thereof. An expression occurring in such statutes, therefore, must receive, consistent with its literal and grammatical sense, a liberal construction. I, therefore, take the view that the concept of commercial relationship in S. 2 of the 1961 Act takes within its ambit all relationship which arise out of or are ancillary and incidental to the business dealings between citizens of two states. The concept takes within its fold all legal relationships pertaining to the international trade in all its forms between the citizens of different States.

40. The agreements between the plaintiffs and the defendants 1 and 2 enshrine, as a predominant stipulation thereunder, sale of necessary equipment and machinery for consideration on terms mentioned therein. The said agreements also provide for supply and furnishing by the defendants 1 and 2 of technical designs, specifications, information and other paraphernlia in respect of the technical know-how for establishment of facilities for production of Polyester Staple Fibre. The agreements also envisage services of the technicians to be provided to the plaintiffs. The sale of goods mentioned therein or the supply of technical information and data covered thereunder is for consideration mentioned in the said agreements. A predominant element of the said consideration is the payment of the price a provided therein. A plain reading of said agreements seen in the context of objectives sought to be achieved clearly established that the agreement pertain to a commercial dealing between the plaintiffs and the defendan 1 and 2. The four party Agreements between the plaintiffs and the defendants partakes the trading attributes of the agreement and is an essential appendage or an essential term of the bargain between the plaintiffs and the defendants project for establishement of the facilities for production of Polyester Staple Fibre [illegible] by the plaintiffs. I reject the contention of the learned counsel for the

plaintiffs that the relationship arising out of the said agreements is not a commercial relationship. I am of opinion that the relationship, established by the said agreements is commercial in character: the word 'commercial' being used in the wider sense under the provisions of S. 2 of the 1961 Act."

41. The learned Counsel Shri. Sen calls attention to the dicta of authority of this Court in K.E. Corpn. v. S. De Traction, AIR 1965 Bom 114. According to the learned Counsel, in an analogous situation or on analogous facts, this Court took a contrary view. The learned Counsel emphasises that this Court in the said case held that an agreement which provides for technical assistance and know-how is not an agreement of commercial character. The learned Counsel says that this Court characterised such an agreement to be an agreement of professional character. In my opinion, the ratio of the said decision is inapplicable to the facts of the present case. It was a case under Arbitration (Protocol and Convention) Act, 1937, a precursor of 1961 Act. In that case it appears that there was an agreement between the parties for technical assistance for electrification of railways. The dispute which arose between the parties related to the recovery of fees. The contention was that the agreement which contemplated the provision for technical assistance by Socite De Traction to the Kamani Engineering Corporation in consideration of fees payable in that behalf was not an agreement of commercial nature. K.K. Desai J. took the view that:

"having regard to the purpose of the Act, I have no doubt that widest meaning must be given to the word 'commercial' as contained in Sec. 2, Commerce has been held to be a thing involving idea of profits and Mr. Parpai has with some force contended that a contract made to make profits ought to be considered commercial".

The learned Judge repelled the contention that the agreement was commercial on the ground that the agreement before him was merely an agreement of technical assistance and such an agreement was not a contract 'for sale of anything' The learned Judge made his finding in the following words:-

"The contract is on the face of it only a contract for technical assistance,. The contract does not involve the Defendants

into any business of the plaintiffs. It is not in any sense participatio in profits between the parties. The remuneration of the Defendants is for that reason described as 'fees' and is only on percentage basis. By this contract the defendants refused to be involved into any business of the plaintiffs and/or any contracts of the plaintiffs. They have scrupulously kept themselves out of any commercial relations with the plaintiffs. In my view the contract is more like a retainer or contract that is made between a Solicitor, a Counsel and an advocate on the one hand and a client on the other. It is difficult to describe such a contract as commercial. It is therefore, difficult for me to accept Mr. Parpia's contention that this contract should be held to be relating to matters considered as commercial according to law in force in India".

It is very clear that notwithstanding the view of the learned Judge as to the connotation of the word 'commercial' the learned Judge held on the facts before him that the agreement in question was not commercial. The facts of the present case are different. As already observed above, the agreements between the defendants 1 and 2 provide not merely for furnishing of technical know-how but also provide for directsale of equipment and machinery; for procuring and furnishing of equipments and for services of technicians to supervise installation and working of the plant. These agreements cannot be said to be agreements for providing for mere technical know-how. These agreements partake the character of what may be called turn-key jobs. These agreements cover a broad spectrum of commercial activity needed for the establishment the facility for production of Polyester Staple Fibre in India by the plaintiffs. The consideration mentioned in the agreement is the price for the goods as also the amounts payable for the services to be rendered including furnishing of the technical information. The provision as to the technical information is merely a part of the bargain between the parties. It is not the whole of it. In my opinion, a co-ordinated understanding of the provisions of the said three agreements leaves no manner of doubt that the agreements involve supply of goods, supply of information and supply of services for consideration mentioned therein. The element of profit is an underlying assumption under these agreements. These agreements must, therefore, be held to be commercial in character.

42. "The inescapable conclusion that agreements are commercial however does not clinch the issue. Such a characterisation does not amount to saying that the agreements between the plaintiffs and the defendants come within the purview of S. 2 read with S. 3 of the 1961 Act. The expression occurring in S. 2 is legal relationships, whether contractual or not, considered as commercial under the law in force in India' (emphasis supplied). It, therefore, follows that not only should the relationship be commercial but such a relationship should be 'considered as commercial under the law in force in India'. The use of the word 'under', in my opinion, is deliberate and predicates coverage. It posits a cloak enveloping an Act. In legal parlance the word 'under' connotes 'by virtue of.' It is sometimes also translated as 'pursuant to'. The expression 'under the law', therefore, must mean 'by virtue of a law for the time being in force'. In other words, before provisions of S. 3 can be invoked, the agreement must be an agreement embodying a relationship considered commercial under a provison of law. In my opinion, in order to invoke the provisons of S. 3 it is not enough to establish that an agreement is commercial. It must also be established that it is commercial by virtue of a provison of law or an operative legal principle in force in India."

43. Shri M.H. Shah, the learned Counsel for the defendants, submits that the law in force means the law generally in force in India. According to the learned counsel, it is not necessary to identify the provisions under which a relationship is considered commercial. The learned counsel says that it is enough to show that the relationship is commercial as normally understood in the legal parlance. The contention is that the use of the words 'commercial relationship is in contradistinction to cultural or matrimonial relationship. I am unable to appreciate the contentions. The question is not as to the import of the word 'commercial'. The question is what effect should be given to the expression 'considered commercial under the law in force in India'. There is no running away from the fact that the commercial relationship under S. 2 must be a relationship considered commercial under the provisions of a law in force in India. The interpretation sought to be given by the learned counsel, if accepted, will render the words 'under the law in force in India' otiose. Such an interpretation will have to be eschewed. The contention of

the counsel, therefore, deserves to be rejected. Shri Shah is unable to call in aid any statutory provision or any operative legal principle in India. Shri Sen's reference to R. 210 of the original and Rules of this Court is inapposite. Shri Shah rightly criticises it on the ground that the said rule is devised for an altogether different purpose. It does not deal with the concept of commercial relationship as a provison of the general law of the land. In the circumstances, I must hold that the agreements though commercial do not fall within the coverage of S. 3 of 1961 Act.

44. I am not impressed by the contention of Shri A.K. Sen that the arbitrations postulated in the agreements have become incapable of performance and thus come within the getaways postulated by S. 3 of the 1961 Act. Can it be said that the arbitration clause contained in the said agreements are incapable of being performed? The answer to such arbitration agreements are capable of performance. The defendants and the plaintiffs can invoke the arbitral fori enumerated in the said arbitration clauses. The arbitral fori set forth in the said arbitration clauses can arbitrate upon the disputes and differences between the plaintiffs and the defendants which have arisen in respect of matters covered by the said arbitration clauses. May be that having regard to the three different arbitrations contemplated by the said clauses or the different principles of law governing the said arbitrations, there might be a possiblity of conflicting awards. The conflicting awards, however, would not render the arbitration agreements incapable of performance. The possibility of conflicting awards merely makes invocation of the arbitral provisions undesirable or improper or inexpedient. But that would not be the same thing as "incapable of being performed" within the meaning of the said expression occurring in S. 3 of the 1961 Act.

45. I am equally unimpressed by the contention of the plaintiffs that the disputes between the parties are not in regard to the matters which have been agreed to be referred the claims of the plaintiffs are based on the alleged breaches committed by the defendants 1 and 2 of their respective obligations under their respective agreements with the plaintiffs. Such breaches entitle the plaintiffs to claim damages and other reliefs against the said defendants. Under the four party agreement the defendants 1 and 2 are also liable

as guarantors in respect of the breaches committed respectively by each of them. The defendants 3 are liable under the said four party agreement for the breaches committed by the defendants 1 and 2. These disputes and differences arise out of the agreements to which the plaintiffs and the defendants are parties. The disputes and differences are covered by the matters enumerated in the arbitration clauses.

46. In my opinion, however, there is another obstacle in the way of the defendants in so far as their contentions based on the provisions of S. 3 of the 1961 Act are concerned. S. 3 of the 1961 Act refers to 'an agreement'. The words are 'an agreement'. The use of the article 'an' indicates the intendment of the section. The section, in my view, deals with a situation where there exists an agreement and the party to such an agreement and the party such an agreement commences legal proceedings in a court in respect of a matter covered by the said arbitration agreement. The section does not contemplate plurality of agreements impinging upon a dispute or a set of disputes. The section has no application to a situation where plurality of agreements converge on disputes and differences which arise out of a single transaction or a series of transactions which are inextricably linked with each other. This interpretation of provisions of the section is in consonance with the intendment, purposes and sheme of the 1961 Act. The 1961 Act is calculated to provide for speedy and effectual set out of international trade. The complications which normally arise from the applicability of the principles of Private International Law by reason of plurality of agreements impinging on a dispute will result in a very unsatisfactory situation. It will not only complicate the matters but will also fail to resolve the conflict that may arise as a result of the application of multifarious and often conflicting principles of Private International Law to a particular set of disputes. The conflicting awards resulting from by multiple arbitral fori contemplated by the multiple agreements, in my opinion would not subserve the intendment of or the purpose contemplated by, the Act. It would thwart the achievement of objectives sought to be served by the 1961 Act. It will, therefore, have to be opined that S. 3 of the 1961 Act has application only to a case and only to such a case, where there exists one agreement which provides for particula arbitral forum and a suit is commended by a party to such an agreement or by a person claiming through him in respect of a matter which is

covered by such an agreement. Any other interpretation of would not only ignore the significance of the use of the word "an" in S. 3 but would make its machinery unworkable and thus defeat the purposes sought to be subserved by the provisions of the 1961 Act.

47. In the instant case there are three arbitration agreements. These arbitration agreements provide for three different arbitral fori. Under Ex. A to the plaint the arbitration has to be in London. Under Ex. B to the plaint the arbitration in in India. Ex. C to the plaint provides for arbitration at London. Thus, three arbitral fori - two sitting in London and one in India - are envisaged by the plaintiffs and the defendants. Not only that the parties have chosen different proper law to govern the proceedings. Ex. A provides for the applicability of the rules of the International Chamber of Commerce and the provisions of the Indian Arbitration Act with the rider that in case of conflicts the rules of International Chamber of Commerce and the provisions of the Indian Arbitration Act in the same of way. It is a moot question as to whether having regard to the provisions of the 1940 Act (India Arbitration Act) an arbitration contemplated to be held is India would permit the supremacy or paramountcy of the rules of the International Chamber of Commerce in case of conflict between the provisions of the 1940 Act and the rules of International Chamber of Commerce. The agreements were made in the United States of America, There is no evidence with regard to the rules of American private international law to enable me to make finding as to whether under the legal system of the U.S.A. provisions of the Indian Arbitration Act would or would not override provisions of the International Chamber of Commerce in respect of an arbitration the venue whereof is in India. This question need not, however, be decided. It is sufficient for the pruposes of the present controversies to observe that the arbitration agreements postulate applicability of different systems of law as the proper law governing the arbitration between the parties. The arbitrati clause contained in the four party agreement specifically commended by Shri M.H. Shah for the defendants does not help matters. It does not further resolution of the problem. It provides for the arbitration in England and the applicability of the rules of the International Chamber of Commerce. It however, cannot govern disputes arising under other two agreements. These multifarious factors governing the adjudication of disputes and differences which constitute an my

indivisible metrix for determination, in my opinion, take the case outside the pale of S. 3 of the 1961 Act.

48. The principles which govern the grant of stay under S. 34 of the 1940 Act are well settled. All the principles need not be noticed. One of the grounds on which the Court refuses stay of proceedings is that the arbitration is appropriate for part only of disputes. The rationale of the rule lies in the principle that normally splitting of causes of action for the purposes of adjudication is not encouraged so as to avoid plurality of proceedings and conflicting decisions. In Gava Electric Supply Co. v. State of Bihar AIR 1953 SC 182, the Supreme Court confirmed an order of refusal to stay the suit on the ground that certain issues arising in the suit were not covered by the arbitration clause contained in the agreement on which the suit was based. It may however, be seen that a Division Bench of this Court (K.D. Desai and Vaidya JJ) in Prakash Cotton Mills Pvt. Ltd. v. Punjab Cotton Co., (Exp. & Imp.) Pvt.Ltd. Appeal No.112 of 1969, decided on 14 Oct. 1969 (unreported), lessened the rigour of the view taken by the Supreme Court by holding that in a case where the frame of the suit is vexatiously designed to provide an escape from compliance with an obligation to refer disputes to arbitration, the Court could grant stay of proceedings notwithstandi the fact that the effect thereof would be splitting the cause of action in the suit.

49. Shri M.H. Shah, the learned Counsel for the defendants, submits that in the present case there would be no splitting of any cause of action. The learned Counsel contends that the entire claim against the defendants in the suit arises out of the four party agreement, subject, however (to paraphrasing the submission of the learned Counsel), 'to the individual liabilities under their respective agreements'. I am afraid, such a contention cannot be upheld. It is doubtedly true that the liability of the defendants 1 in regard to the breaches committed by the defendants 2 and that of the defendants 2 in regard to breaches committed by the defendants 1 or the liability of the defendants 3 with respect to breaches committed by the defendants 1 and 2 of their obligations under their respective agreements are governed by the said four party agreement. But that liability appears to be limited to the extent of Rs.50,00,000/-.

The claim of the plaintiffs in suit is in a sum of 5,58,07,731.87 p. as against the defendants 1 and 2. The claim relates to the breaches committed by the defendants 1 and 2 respectively of their obligations under their agreements. One of the grounds upon which damages are claimed is that the test runs were not properly conducted. It is undoubtedly true that the obligation for test runs was that of the defendants 2. That may be so. But the obligation of the plaintiffs to pay a part of the consideration to the defendants 1 under their agreement with the defendants 1 could arise only after the successful test runs were held by the defendants 2 in consonance with their obligations as contained in Article V of their agreement with the plaintiffs. As already observed above, the terms of the agreements telescope into each other. The learned Counsel for the defendants emphasises that the liability of the defendants under the four party agreement is common and identical. That, however, does not detract from the position that the cause of action against all the defendants arises under three agreements. The cause of action even in respects of the enforcement of rights under the four party agreement is founded upon breaches committed by the defendants 1 and 2 of their respective obligations. Moreover, the assertion of the learned Counsel himself that the entire claim arising under the four party agreement is subject to the individual liabilities of the defendants 1 and 2 under their respective agreements unmistakably underlines the fact that the disputes and differences in respect of claims of the plaintiffs as against defendants 1 and 2 for breaches by them of their respective obligations under their respective agreements are wholly ouside the purview of the arbitration clause contained in the four party agreement. The frame of the suit, of necessity, is indivisible. The suit has been properly framed having regard to the terms and conditions of the said three agreements and the fact of the case. The suit, in regard to the claims of the plaintiffs or the liabilities of the fact and law. The evidence pertaining to the claim in suit would be common and identical. In these circumstances, it cannot be said that the frame of the suit is vexatious or is deliberately so designed as to enable the plaintiffs to get out of their obligations arising under the arbitration clauses contained in the said agreements. The ratio of the decision of the Division Bench of this Court in Prakash Cotton Mills (Appeal No. 122 of 1968) is inapplicable to the facts of the present case.

50. The balance of convenience also requires that this Court should decline stay of the proceedings in the suit. The arbitrations under the plaintiffs' agreements with the defendants 1 and defendants 3 are to be held in London. The arbitration under the agreement with the defendants 2 has as its venue some place in India. The entire evidence will be in India inasmuch as the plaintiffs claim that the defendants 1 and 2 committed breaches of the obligations which had to be performed in India. The reports in regard to the test runs and other vital issues in the matter would be in India. There is yet another aspect. It is that in course of the negotiations between the parties, after the filing of the suit, no final agreement was arrived at by which the arbitration clauses were modified, but parties had anticipated difficulties in the matter of grant of foreign exchange. I cannot ignore the fact that one of the essential factors which weighed with the parties and which came up for serious consideration was the unlikelihood of the Reserve Bank sanctioning necessary foreign exchange to the plaintiffs. This is clearly reflected in the minutes of the meetin dated 18th and 19th Feb. 1976, the draft agreements as also the draft letter Ex. H. (collectively) to the petition. In the V/O. Tractoroexport's case (AIR 1971 SC 1) (supra) the Supreme Court had occasion to consider the impact of such a situation. At page 12 of the report the Supreme Court observed as follows:-

"In this context we cannot also ignore what has been represented during the arguments. Current restrictions imposed by the Government of India on the availability of foreign exchange of which judicial notice can be taken will make it virtually impossible for the India firm to take its witnesses to Moscow for examination before the arbitral tribunal and to otherwise properly conduct the proceedings there".

The learned Counsel for the defendants contends that question whether foreign exchange would or would not be available is a question of fact and there is no material on record to warrant any finding that requisite foreign exchange will not be xg available to the plaintiffs. In my opinion, such a contention puts a gloss over the a footing on which the parties themselves proceeded in course of the negotiations. The minutes of the meetings dated 18th Feb. 1976 and 19thFeb. 1976 as also the draft letters Ex. H. colly. to the petiton show that parties themselves anticipated difficulties in the matter of the Reserve Bank granting foreign exchange for the purposes of enabling the plaintiffs to pay ever the fees of the English Arbitrator. Implicit in the said footing was th

likelihood of the Reserve Bank not sanctioning foreign exchange. Consequently, having regard to the facts that the evidence of the matter would be in India and that the Reserve Bank might not sanction foreign exchange to the plaintiffs, it will have to be held that the balance of convenience requires that the suit ought not to be stayed and the foreign arbitration should not be permitted to proceed so as to considerably prejudice the claims or the defences of the plaintiff

51. In the circumstances, while rejecting the contention of the plaintiffs that there was a modification or a supersession of the arbitration clauses contained in the three agreements between the plaintiffs and the defendants, I must hold that the defendants have not made out a case for stay of the proceedings in suit No. 199 of 1976. In the result, I pass the following order:-

52. In Petition No.72 of 1976 relief in terms of prayer (a) declined. As to prayer (b), in view of S. 35 of the Arbitration Act, relief in terms thereof granted. The Notices of Motion No.452 of 1976, 453 of 1976 and 454 of 1976 as also the Arbitration Petitions Nos,88 of 1976, 89 of 1976 and 90 1976 dismissed. No, order on the Arbitration Petition No.78 of 1976 in view of the final order made in the main petition being Arbitration Petition No.72 of 1976.

53. With regard to costs, the plaintiffs have failed on their factual contention but have succeeded on other points raised by them in support of their claims. The matters were argued at length. In the facts and circumstances of the case, I think that the proper order for costs would be to make costs of all these proceedings costs in the said Suit No. 199 of 1976.

Order accordingly,.
