plaintiff has not specifically prayed in the plaint for a decree for eviction against defendants Nos. 3 to 14 there is specific pleading that the lease against the defendants Nos. 1 and 2 stands determined by efflux of time and the plaintiff is therefore entitled to recover possession from the defendants. In our view, Mr. Roy Chowdhury is justified in his contention that there is no impediment in passing the decree for eviction against the defendants Nos. 3 to 14 even in the absence of any specific prayer for eviction against the said defendants Nos. 3 to 14 in the plaint when the requisite pleadings for such decree for eviction against the said defendants have been made in the plaint. It however appears to us that the defendants Nos. 3 to 14 being the sub-tenants, cannot be held to be the assignees of the lessees namely the defendants Nos. 1 and 2 under the said instrument of lease between Ranjit Kumar Basu and Hazi Ansarullah. Mr. Dutt, in our view, is right in his contention that there is no privity of contract or privity of estate between a sub-tenant and the head lessor by which there is any obligation of a sub-tenant to pay rent to the head lessor. But in the facts and circumstances of the case, we are of the opinion that the plaintiff had realised rents from seven sub-tenants for a few months between April, 1964 to June, 1964 not by treating the said sub-tenants as per direct tenants but such realisation of rent from them was made at the instance of her lessees namely the defendants Nos. 1 and 2 to liquidate the arrears of rent payable by such lessees to the plaintiff. The defendants Nos. 3 to 14 in their written statement have specifically stated that they are the tenants under the said lessees and they are paying rents all along to their landlords against receipts. The said defendants have also declined to lead any evidence in the suit. In our view, Mr. Dutt is not right in his contention that in view of the pleadings of the parties and the issues framed by the learned Judge there was no occasion for the defendants Nos. 3 to 14 to depose. There is a specific pleading that the plaintiff is entitled to recover possession of the demised premises from all the defendants including defendants Nos. 3 to 14 and a specific issue has also been framed to that effect. If the defendants Nos. 3 to 14 had really intended to oppose the said prayer, it was their duty to lead positive evidence in support of their case of direct tenancy. It appears to us that as the said defendants have specifically admitted that they are the tenants under the lessees of the plaintiff, there was no occasion for them to give any evidence contrary to such specific pleading made by them. Needless to say, that even if they had led any evidence contrary to their written statement, such evidence should not have been accepted. The depositions of the plaintiff and her daughter are in conformity with the written statement filed by the defendants Nos. 3 to 14 and we are inclined to accept the case of the plaintiff that the plaintiff had never intended to accept the said defendants Nos. 3 to 14 as her direct tenants and rents for few months from some of such sub-tenants had been realised at the instance of the defendants Nos. 1 and 2 liquidate the arrears of rent payable by such lessees to the plaintiff. By such realisation of rents, the plaintiff had not accepted the sub-tenants as her direct tenants and the said sub-tenants also did not pay rent for the purpose of creating a relationship of landlord and tenant between the plaintiff and the said sub-tenants and the written statement filed on behalf of the defendants Nos. 3 to 14 clearly supports the case of the plaintiff in this regard.

8. In the aforesaid circumstances, we do not find any reason to interfere with the decree passed in the instant suit. This appeal, therefore, fails and is dismissed.

9. There will be no order as to costs.

SANKARI PRASAD DAS GHOSH, J.:— I agree.

Appeal dismissed.

AIR 1986 CALCUTTA 45

T. K. BASU, J.

Josef Meisaner GMBR & Co., Applicant v. Kanoria Chemicals & Industries Ltd., and another, Opposite Party.

Suit No. 93 of 1984, D/- 24-6-1985.

(A) Foreign Awards (Recognition and Enforcement) Act (45 of 1961), S. 3 — Application for stay of suit on ground of existence of arbitration agreement under terms of contract — Held application was not maintainable.

HC/IC/E46/85/HR/MVJ

The plaintiff, an Indian firm, entered into a Technical Collaboration Agreement with defendant 1, a foreign firm, whereunder defendant 1 was to supply technical know-how, information and basic engineering to the plaintiff for setting up a plaint for manufacturing Pentasrithrytol (Penta) and its by-product. The agreement contained an arbitration clause providing for the reference of all disputes arising under the contract, to an arbitrator in a foreign country. Another agreement was entered into between the plaintiff and defendant 2 firm, known as the Engineering Services Agreement, whereunder the defendant 2 firm was to provide consultancy and supervision of the various items of civil engineering, mechanical engineering, electrical engineering and other services which were necessary for the setting up of the plant. The agreement also provided for consultation with and approval of defendant 1 foreign firm with regard to several items of consultancy and supervision which the defendant 2 firm would have to undertake. Another agreement was entered into between the plaintiff and defendant 1 foreign firm, called the Equipment Purchase Agreement whereunder defendant 1 foreign firm was to supply what was described as the critical Equipment for the setting up of the plant. Pursuant to the aforesaid agreements, the work on the construction of the plant commenced. A contractor for the construction of the Civil Engineering Works was engaged by the plaintiff in consultation with and under the guidance of defendant 2 firm. The plaintiff also appointed contractors for the purpose of mechanical erection of the plant, electrical installations, erection of instruments and for insulation, in consultation with and under the guidance and direction of defendant 2 firm. The plant was finally commissioned. However, the production capacity of the plant, after commissioning, was found to be far below the stipulated capacity both in respect of Penta and in respect of its by-product. The plaintiff, therefore, instituted the instant suit against both the defendants 1 and 2. According to the plaintiff, the admitted deficiency in the production capacity of the plant could have been due to various reasons. First it could be that the technical know-how supplied by the defendant No. 1 was deficient, Secondly, it could be that the critical equipment which were supplied by the defendant No. 1 from Germany was deficient. Thirdly, it could be that the basic drawings and designs which were supplied by the defendant No. 1 were deficient. Fourthly it could be that the detailed engineering services provided by the defendant No. 2 were deficient. Thus, according to the plaintiff, the real dispute was as to who among the two defendants were responsible for the deficient performance of the plant and to what extent. As the plaintiff was in doubt as to which of the two defendants was liable and to what extent, the plaintiff impleaded both the defendants for determination of the dispute as between all the parties. Now, defendant 1 foreign firm filed an application for stay of the suit u/s. 3 of the Act, on the ground that the Technical Collaboration Agreement between the plaintiff and the defendant 1 contained an arbitration clause providing for reference of all disputes arising under the contract, to a foreign arbitrator. The question was whether such a stray application was maintainable in the instant case.

Held, the application for stay was not maintainable as the role of the defendant 2 firm in the erection and commissioning of the plant, viewed in its totality, was an inextricable part of the dispute in the instant case, and the arbitration, in respect of which the application for stay had been made, did not cover this dispute between the plaintiff and defendant 2 firm. That being so the dispute in the instant case viewed as a whole could not be said to be in respect of a matter which had been agreed to be referred within the meaning of S. 3 of the Act. Thus, the application for stay of the suit was liable to be dismissed as not maintainable. (Para 31)

(B) Foreign Awards (Recognition and Enforcement) Act (45 of 1961), Ss. 2 & 3 — Agreement between Indian Company and foreign firm for supply of technical know-how and expertise by foreign firm to Indian Company in exchange for payment of 'fee' — Not a commercial transaction within S. 2 — Hence, suit based on contract, could not be stayed u/s. 3. (Para 40)

Cases Referred :	Chronological Paras
(1982) 1 Cal LJ 511	34
AIR 1965 Bom 114	38

Somnath Chatterjee, for Applicant; Dipankar Gupta, for Opposite Party.

ORDER:— This is an application under the provisions of Foreign Awards (Recognition and Enforcement) Act 1961 for stay of the present suit, being Suit No. 93 of 1984 (Kanoria Chemicals & Industries Ltd. v. Josef Meisaner GMBH & Co. and another). The facts relating to the present application may be briefly noted.

2. The plaintiff Kanoria Chemicals & Industries Ltd., (hereinafter referred to as Kanoria) is, inter alia, engaged in the manufacture of heavy chemicals. Pentasrithrytol (hereinafter referred to as Penta) is a vital organic chemical and is used, inter alia, in the manufacture of detonator and explosive, surface coating resins, adhesives, printing inks etc. It can be of various grades.

3. Kanoria was desirous of a setting up of plant for manufacturing of Penta. With that objective in view Kanoria made an application to the Ministry of Industries, Department of Industrial Development, Government of India for the grant of industrial licence under the Industries (Development and Regulation) Act, 1951. The authorities duly issued a letter of intent.

4. After the receipt of letter of intent, Kanoria initiated enquiries with various international parties for obtaining suitable technology for the project. Ultimately, Kanoria entered into a Technical Collaboration Agreement with the applicant Josef Meissner GMBH & Co. (hereinafter referred to as Meissner). The agreement dated the 7th January, 1981 recited that Meissner owns technical know-how and information regarding the manufacture of Penta and its by-products odium Formate and was willing to transmit it to Kanoria for Kanoria's use. The agreement which is annexed to the petition provided, inter alia, that Meissner will provide Kanoria with know-how and basic engineering which is necessary for Kanoria to own, engineer, construct, operate and maintain the plant. The agreement provided in considerable detail the know-how, information and the basic engineering which has to be provided by Meissner to Kanoria.

5. Ext. III to the agreement provided, inter alia, that the plant will be capable of achieving a minimum production rate of 4 tonnes per day of Penta along with the by-product Sodium Formate at a minimum production rate of 55% of Penta.

6. Article 13 of the Agreement contains an Arbitration Clause which is in the following terms.

"All disputes or differences or claims whatsoever which arise in relation to or in connection with or pertaining to the contract between the parties hereto shall be referred to International Chamber of Commerce, Paris and the award made in pursuance thereof shall be binding on the parties."

7. On or about the 2nd September, 1981 an agreement was entered into between the Kanoria and Humphreys & Glasgow Consultants Pvt. Ltd., (hereinafter referred as Humphrey) which is the defendant No. 2 in the suit. This agreement which is known as Engineering Services Agreement generally provides that Humphrey will provide consultancy and supervision of the various items of civil engineering, mechanical engineering, electrical engineering and other services which are necessary for the setting up of the plant. The agreement also provides for consultation with and approval of Meissner with regard to several items of consultancy and supervision which Humphreys would have to undertake. This agreement contains an arbitration clause for arbitration of disputes under the Indian Arbitration Act, 1940. We are not really concerned with this arbitration clause in this application.

8. On or about the 11th November, 1981 another agreement was entered into between Kanoria and Meissner which was described as Equipment Purchase Agreement. Under this agreement, Meissner was to supply what has been described as the Critical Equipment for the setting up of the plant.

9. Pursuant to the above agreements, the work on the construction of the plant commenced and the plant was commissioned, according to the plaint, on or about the 20th June, 1983. The admitted case of the parties is that the production capacity of the plant after commissioning was found to be far below the stipulated capacity both in respect of Penta and in respect of Sodium Formate, the by-product.

10. It is not necessary at this stage to deal

with the case made in the plaint because it will have to be adverted to in connection with the respective contentions before me in this application. Suffice it to say that the present suit out of which this application arises was filed around the middle of February, 1984.

11. As I have indicated, this application is filed under S. 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961. In order to appreciate the contentions raised by the parties before me it will be useful to set out S. 3 of the abovementioned Act which is in the following terms.

"3. Notwithstanding anything contained in the Arbitration Act, 1940 or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which 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 arbitration agreement or any person claiming through or under him in respect of any matter agreed to be referred any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceeding 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 make an order staying the proceedings."

12. Mr. Dipankar Gupta, who appearing on behalf of Kanoria opposing the application for stay of suit, submitted that one of the fundamental preconditions for the applicability of S. 3 of the Act is that the legal proceedings must be in respect of any matter which has been agreed to be referred to arbitration under the arbitration agreement. He drew my attention to the fact that although the Technical Collaboration Agreement contains an arbitration clause for reference of any dispute to the International Chambers of Commerce in Paris the second agreement with Meissner which is described as Equipment Purchase Agreement does not contain any such arbitration clause.

13. According to Mr. Gupta the legal proceeding i.e., the present suit relates to a matter which has not been agreed to be referred to arbitration. In support of this contention, detailed reference was made to the plaint in this suit by Mr. Gupta. In the plaint there is a reference in the initial paragraphs to the two agreements between Kanoria and Meissner and to the terms and conditions thereof in some detail. In paragraph 8 of the plaint it is stated that Meissner represented to Kanoria that they had satisfactorily commissioned a similar plant in Spain. They further represented that the consumption figures of raw materials and utilities mentioned in their offer were guaranteed figures which in practice would be somewhat lower. In paragraph 11 it is stated that on the 7th January, 1981 the same date as of the first agreement, Meissner wrote to Kanoria to say that they would not be responsible for the guarantee given in the Technical Collaboration Agreement unless the equipment necessary for the erection of the plant which was mentioned in a list enclosed with the letter was imported from Germany. This letter was subsequently superseded, but as mentioned earlier a second agreement was entered into between Meissner and Kanoria for the purchase of what had been called the critical equipment from Germany. In paragraph 16 of the plaint, there is a reference to the agreement between Kanoria and Humphreys and Glasgow for carrying out the detailed engineering and allied services of the plant based on the know-how and basic engineering to be supplied by Meissner under the Technical Collaboration Agreement. As mentioned earlier, this is described as the Engineering Services Agreement with the defendant No. 2. In paragraph 24 of the plaint, it has been stated that under the Technical Collaboration Agreement Meissner supplied to Kanoria and to the defendant No. 2 various data, information, documents, designs and drawings purporting to be the technical know-how and basic engineering for the setting up of the plant. According to this paragraph, all data, information, documents, designs and drawings supplied by Meissner to Kanoria were duly made available by Kanoria to the defendant No. 2. On the basis of the aforesaid data, information, documents, designs and drawings the defendant No. 2 purported to prepare detailed engineering drawings comprising, inter alia, all engineering flow-

sheets and equipments drawings, construction drawing and other data and materials.

The defendant No. 2 also purported to supply procurement specifications and other data information, documents, designs and drawings to Kanoria in purported compliance of their obligation under the Engineering Services Agreement.

14. According to the plaint, design conferences and other conferences were held as required by Meissner and/or the defendant No. 2 for the purpose of setting up the plant. In course of the said conferences, Meissner gave advice on all relevant technical matters and other aspects relating to the construction of the plant including procurement of equipments in India. It is also the case of the plaintiff that at all material times the detailed engineering drawings and other data and materials prepared or supplied by the defendant No. 2 were freely and fully made available to Meissner and Meissner reviewed the same as considered necessary by them. Meissner at all relevant times fully approved of the work done by the defendant No. 2 and did not raise any objection thereto.

15. In the meantime a contractor for the construction of the Civil Engineering Works was engaged by Kanoria in consultation with and under the guidance of the defendant No. 2. The scope of work of the civil engineering contractor as well as the terms and conditions of their appointment were approved by the defendant No. 2. According to the plaint, Kanoria also appointed contractors for the purpose of mechanical erection of the plant, electrical installation, erection of instruments and for insulation in consultation with and under the guidance and direction of the defendant No. 2.

16. Para 32 of the plaint is as follows :

"Thereafter the erection of the equipment in the plant was started under the guidance, supervision and control of the defendant No. 2. The defendant No. 1 also deputed their engineers to come to India during this period. On this occasion also the engineers of the defendant No. 1 checked and scrutinised the detailed engineering drawings and in particular the piping drawings without raising any objection thereto. They also supervised the erection of the equipment then going on and in particular the erection of the equipment imported under the Equipment Purchase Agreement."

17. In paragraph 34 it is stated that in or about third week of May, 1983 the engineers of Meissner came back to India and supervised the concluding stages of the erection of the plant. The plant was formally inaugurated on the 28th May, 1983, but the senior engineer of Meissner advised Kanoria not to commission the plant. Instead, he advised and directed substantial modifications to be carried out to the plant and particularly to the pipings thereof. According to the plaint, these modifications were carried out according to the directions of the engineers of Meissner. These modifications were enormous and time consuming and involved substantial expenditure. Hydraulic testing and other necessary checks and tests of the various systems including water trials were carried out under the control or supervision of Meissner and/or the defendant No. 2. Ultimately Meissner advised and represented to Kanoria that the plant could commence operation on or about the 20th June, 1983.

18. Paragraph 33 of the plaint is as follows :—

"Shortly thereafter the plant was started up and continued to operate under the supervision of the engineers of the defendant No. 1 including their senior engineer. The operation of the plant during this period was an utter failure. The production was not sustained and was extremely meagre. It was also sub-standard. The raw materials and utility consumption were extremely high. There was no production of Sodium Formate and the total operation of the plant was erratic. Under the circumstances the defendant No. 1 advised the plaintiff that the plant operation should be discontinued from the 14th July, 1983 and advised that further modifications in the plant as well as water trials with utilities were necessary in order to check the accuracy of their design parameters."

19. According to the plaint after the 14th July, further works of modification and prolonged experimentation and water trials were carried out under the direction and supervision of the engineers of Meissner. Thereafter Meissner's engineers informed

Kanoria that the plant would be ready to start up again by the 15th August, 1983. And on this basis the senior engineer of Meissner arrived in India on or about the 23rd August, 1983. After his arrival the senior engineer of Meissner gave a further list of works alleged to be necessary which were again carried out. Meanwhile, Kanoria suffered considerable loss and damages.

20. Paragraph 41 of the plaint is in the following terms :

"41. The plant was again started up on or about the 4th September, 1983 and operated till about the 28th September, 1983 under the direct supervision, control and guidance of the engineers of the defendant No. 1 including the senior engineer. During this period also the performance of the plant was totally unsatisfactory as will appear inter alia from the following :

(a) The average production of Penta did not exceed about 600 Kgs. per day although adequate and requisite raw materials and utilities were put in.

(b) The quality of the Penta produced was totally sub-standard.

(c) No significant quantity of Sodium Formate could be produced.

(d) The raw materials and utility consumption were totally disproportionate to the production."

21. On the advice and direction of the site and Senior Engineer of Meissner, the operation of the plant was discontinued on or about the 20th September, 1983 and the entire process solutions contained in the plant were drained out and operations restarted with fresh raw materials. It was represented by the representatives of Meissner that the plant would be able to start up and achieve stabilized production shortly if the process solutions then inside the plant were completely replaced. Meissner also directed a further list of modifications to be carried out which were complied with. Thereafter the plant was started up again on the 4th October, 1983 on the advice and direction given by the site engineers of Meissner including the senior engineer. But the performance of the plant had not at all improved. The deficiencies remained as before and the plant failed to achieve any reasonable level of performance.

22. Paragraph 44 of the plaint is in the following terms :

"44. The plaintiff states that the plant has been erected on the basis of the technical information supplied by the defendant No. 1, the detailed engineering and other services rendered by the defendant No. 2. The vital parts of the plant encompassing all the sections thereof had been supplied by the defendant No. 1 from Germany. The plant had been engineered, erected and operated under the control and supervision of engineers and technicians of the defendant No. 1 and/or the defendant No. 2 at all stages of the project. All the instructions, advice, modifications reasonable or otherwise of the defendant No. 1 and/or the defendant No. 2 had been carried out in good faith. The defendant No. 1's engineers had already spent about 16 man-months in the plant against the original estimate of about 12 man-months."

23. According to the paragraph 45 of the plaint, the equipments supplied under the Equipments Purchase Agreement by the Meissner were defective and the technical know-how and the basic engineering supplied by Meissner under the Technical Collaboration Agreement were deficient. The engineers deputed by Meissner lacked the capability of performing their job properly. Kanoria protested to Meissner's engineers about the unsatisfactory performance of the plant whereupon Meissner withdrew completely from the work and recalled their site engineers to Germany.

24. Thereafter the plaintiff's representatives went to Germany and had discussions with representatives of Meissner at Cologne between 24th October, and 27th October, 1983. During this discussion Meissner's representatives made out a list of works including the modifications which according to them were necessary to be carried out in the plant for stabilization of production. According to Meissner, the detailed engineering work had not been carried out and some deficient Indian equipment had been procured and the supervision of the erection was not satisfactory.

25. On the return of Kanoria's representatives to India, a thorough review and a detailed survey and assessment of the entire work of setting up of the plant was undertaken. It appeared that many of the

works and modifications contained in the proposal of Meissner recorded on the 27th October, 1983 had already been carried out and some of the suggestions were vague and the others were not relevant for the satisfactory performance of the plant. According to the plaint, Meissner had no clear idea as to the problems involved in the plant or the solutions thereto.

26. Paragraph 65 is important for our purpose and may be set out hereinbelow :—

"65. In the event of it being held that the allegations of the defendant No. 1 attributing the malfunctioning of the plant to causes such as defects and deficiencies in the detailed engineering work, procurement of equipment of India and supervision of erection are correct, then in such event the plaintiff states that the defendant No. 2 had committed breach of their obligations and duties under the said Engineering Services Agreement."

27. According to Mr. Gupta at this stage before me the nature of the dispute between the parties has to be gathered from the plaint. From the plaint extracts from which have been elaborately set out above, it is clear that the participation of the defendant No. 1 and the defendant No. 2 in the erection and commissioning of the plant had become inextricably intertwined. The know-how and the critical equipments were provided by the defendant No. 1. The basic drawings and designs also were provided by the defendant No. 1. The defendant No. 2 provided what has been called the detailed engineering services. These services provided by the defendant No. 2, it appears from the records, were in the nature of consultancy services relating to practically every aspect of the erection of the plant including the civil, mechanical, electrical services etc. According to the plaintiff the civil engineering contractors were engaged by it after consultation with and on the advice of the defendant No. 2. According to the plaint, senior engineers of the defendant No. 1 came from Germany from time to time and rendered advice at various stages of the erection and commissioning of the plant. Whatever drawings and designs were provided by the defendant No. 2 were approved by the defendant No. 1. Further even after the initial commissioning of the plant the defendant No. 1 suggested certain modifications at different stages which according to the plaintiff were duly carried out by it. It appears from one of the paragraphs of the plaint set out above that the defendant No. 1 is contending that the detailed engineering services provided by the defendant No. 2 were defective as a result whereof the production of the plant was below the stipulated capacity.

28. According to Mr. Gupta, the admitted deficiency in the production capacity of the plant may be due to various reasons. First it may be that the technical know-how supplied by the defendant No. 1 was deficient. Secondly, it may be that the critical equipment which were supplied by the defendant No. 1 from Germany was deficient. Thirdly, it may be that the basic drawings and designs which were supplied by the defendant No. 1 were deficient. Fourthly it may be that the detailed engineering services provided by the defendant No. 2 were deficient.

29. According to Mr. Gupta the real dispute is as to who among the two defendants is responsible for the deficient performance of the plant and to what extent. That is why in paragraph 65 of the plaint the plaintiffs have made an alternative case and prayed for appropriate reliefs against the defendant No. 2. As was pointed out by Mr. Gupta, this is a situation which is contemplated by O. 1. R. 7 of the Code of Civil Procedure, 1908 which is as follows :—

"Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."

30. It was pointed out by Mr. Gupta that in so far as the dispute between the plaintiff and the defendant No. 2 is concerned it cannot be resolved within the ambit of the arbitration clause in the Technical Collaboration Agreement between the plaintiff and the defendant No. 1. Admittedly there is no arbitration clause between the plaintiff and the defendant No. 1 with regard to the Equipment Purchase Agreement. Therefore it was submitted that the dispute in the present case viewed in its totality cannot be said to have been agreed to be referred within the meaning of the arbitration clause.

31. In my view this submission of Mr. Gupta is sound and should be accepted. In my view the role of the defendant No. 2 in the erection and commissioning of the plant viewed in its totality is an inextricable part of the dispute in the instant case. I am further of the opinion that the arbitration agreement in respect of which the present application has been made does not cover this dispute between the plaintiff and the defendant No. 2. That being so the dispute in the instant case viewed as a whole cannot be said to be in respect of a matter which has been agreed to be referred within the meaning of S. 3 of the 1961 Act. This contention of Mr. Gupta therefore succeeds.

32. The next submission of Mr. Dipankar Gupta was based on S. 2 of the Act of 1961 the relevant portion whereof provides as follows :

"In this Act, unless the context otherwise requires, 'foreign award' means an award on differences between persons arising out of the legal relationships, whether contractual or not, considered as commercial under the law in force in India made on or after the 11th October, 1960. .....

33. On the strength of the above portion of S. 2 of the Act, it was submitted by Mr. Gupta that a pre-condition for the applicability of the Act and S. 3 thereof is that the relationship between the parties must be a commercial relationship according to the Indian Law.

34. My attention was drawn to a decision of this Court in the case of Micoperi S. P. A. v. Sansouci Pvt. Ltd., reported in 1982(1) CLJ 511. The facts of that case are relevant and may be briefly noted. An agreement was entered into by and between Micoperi S. P. A., the petitioner, a company incorporated in Italy and the respondent an Indian company on the 7th July, 1980. Under the agreement the petitioner appointed the respondent as its representative and consultant for inter alia the following works.

(a) To assist and advise the petitioner in connection with proposals or bids to the Oil & Natural Gas Commission of India and Mazagaon Dock Ltd., both statutory Corporations in respect of designs, engineering, procurement of materials, fabrications, transportation and installations including structures, pipelines and other facilities proposed to be fabricated and/or installed by the said Corporations on the off-shore continental shelf of India for winning petroleum products.

(b) To advise the petitioner on law, rules, regulations and revenue in the preparation of such proposals and bids.

(c) To assist and advise the petitioner in the negotiations with the said statutory Corporations concerning the aforesaid as also in respect of contracts relating thereto.

(d) To assist and advise the petitioner in matters of permits, licences and other Government approvals required for operating in the territorial waters of India and bringing constructions, equipments and spare parts into India.

(e) To assist and advise the petitioner in negotiations with the Government authorities relating to performance of the obligations of the petitioner under any contract including import and export clearance for vessels, construction equipments and spare parts as also visas, work permits, exchange guarantee, radio and other licences required for construction and operation.

(f) To assist the personnel of the petitioner through customs and provide them transportation.

(g) To provide the petitioner suitable office space and arrange for telephone, telex and duplicating facilities therein and also arrange for free storage for spare parts and material required for performance of contracts.

(h) Arrange for medical services for the personnel of the petitioner.

(i) Render liasion service with the said statutory Corporations.

(j) Assist and advise the petitioner in the selection of and negotiations with sub-contractors, vendors and suppliers in connection with he performance of contracts.

(k) Assist and advise the petitioner in obtaining local labour, negotiating labour contracts and handling labour claims and also in maintaining good labour relationship.

(l) Assist and advise the petitioner in its dealings with the said statutory Corporations

and in respect of fulfilling all contracts and on claims thereunder including negotiations for additional and extra work.

35. On the 26th February, 1981 the respondent filed a suit in this Court against the petitioner being the Suit No. 151 of 1981 claiming several money decrees aggregating to over two crores alternatively, an enquiry into the damages suffered by the respondent and a decree for such sum as may be found due, accounts and other reliefs.

36. On the 10th March, 1981, an application was made on behalf of the petitioner, inter alia, for an order that the suit and proceedings thereunder are stayed.

37. In paragraph 28 of the Report D. K. Sen, J. who delivered the judgment refers to S. 2 of the Act which was referred to by Mr. R. C. Deb who appeared for the respondent. Paragraph 29 onwards of the judgment is material for our purpose and may be set out below :

"29. He contended that the legal relationship between the parties, in the instant case, could not be considered as commercial under the law in force in India and therefore the defendant was not entitled to a stay of this suit under the said Act. He submitted that under the agreement between the parties, the respondent was obliged only to render certain professional services to the petitioner. Such services were partly technical and partly legal. No commerce was involved in such services and the same did not come within the dictionary meaning of the expression 'commerce' which meant any act or transaction relating to commerce or trade.

30. Next he drew my attention to R. 1 of Chapter XII of the Rules of the Original Side of this Court which provides as follows :—

'Commercial suits arising out of the ordinary transactions of merchants, bankers and traders; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, carriage of goods by land, insurance, banking and mercantile agency, and mercantile usages, and debts arising out of such transactions.'

38. Thereafter His Lordship goes on to refer to a number of decisions of this question — one decision in the case of Kamani Engineering Corporation Ltd. v. Societe De Traction, reported in AIR 1965 Bom 114. In that judgment the following passage occurs :—

"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 participation 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 plaintiff and/or any contracts of the plaintiffs. They have scrupulously kept themselves out of any commercial relations which 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."

Paragraphs 45 and 46 of the Report are in the following terms :—

"45. Keeping the said Rule as also the dictionary meaning of the word 'commercial' in view, it is to be examined whether the agreement in the instant case has brought about a commercial relationship between the parties. The work for which the petitioner has come to India cannot be considered to be an ordinary commercial transaction. It has been engaged for setting up of special installations for winning off-shore oil. Such work is more in the nature of a building contract. In the course of executing such works the petitioner may have to supply and/or import goods but nevertheless the transactions between the statutory corporations involved and the petitioner would not be an ordinary transaction between merchants and traders. The respondent had been engaged by the petitioner as its representative and adviser in connection with the work to be executed by the petitioner. The services required from the respondent were mainly to represent and advice the petitioner. The respondent is not called upon to supply any goods as a trader or a merchant. The service to be rendered by the plaintiff in connection with the setting up of the installations are more in the nature of professional and/or technical service to the petitioner. The relationship between the parties

is not one arising in an ordinary transaction between merchant and traders nor does it involve construction of mercantile documents or export, import, carriage or insurance of goods. The agency between the parties is not a banking of ordinary mercantile agency.

46. Taking all these factors into consideration, it does not appear to me that the agreement between the parties has resulted in the establishment of any commercial relationship between the petitioner and the respondent as is ordinarily understood by the said expression. A suit arising out of such a relationship under the Rules of the Original Side of this Court would not be marked as a Commercial Suit. For the reasons as stated, S. 2 of the Act of 1961 does not apply in the facts of this case and as such the petitioner is not entitled to a stay of this suit under S. 3 of the said Act."

39. Strongly relying on the above decision, Mr. Gupta submitted that the contracts between the parties in the present case which contained the arbitration clause are strikingly similar to the contract involved in the above decision. It was pointed out that we are not concerned with what has been referred to as an Equipment Purchase Agreement because that agreement does not contain any arbitration clause. The Technical Collaboration Agreement with which we are concerned is merely an agreement for the supply of technical know-how by Meissner to Kanoria. There is no question of participation in the profits under the agreement. The remuneration payable to Meissner is a certain amount of German Currency as "fees" which was also the case before the Bombay High Court as noted above. Consequently, it was submitted that following the reasonings of D. K. Sen, J. in the above case I should hold that the relationship between the parties is not a commercial one as contemplated by Section 2 of the Act of 1961.

40. In my view, this submission of Mr. Gupta should be accepted. I am of the view that the agreement in substance provides for the supply of technical know-how and expertise from Meissner to Kanoria in exchange for the payment of a 'fee' to Meissner. There is no element of transaction between the merchants and traders as understood in Indian Law. Consequently, Section 3 of the Act of 1961 has no application to the facts and circumstances of the present case.

41. As a corollary to the principal point argue of Mr. Gupta it was submitted by him that for the reasons in support of that argument I should also hold that the arbitration agreement is either inoperative or incapable of performance in order to settle the dispute between the parties herein, as envisaged in Section 3 of the Act. Mr. Somnath Chatterjee appearing for Meissner submitted that the arbitration agreement becomes inoperative or incapable of performance in order to settle the dispute between the parties as envisaged in Section 3 only when the agreement becomes inoperative and incapable of performance for all times to come. According to Mr. Chatterjee that cannot be said to be so in the present case.

42. I am merely recording the rival contentions because in view of my findings on the other two questions this controversy is not necessary to be decided in the present case.

43. This disposes of all the questions which were raised by the parties in the present case.

44. These are my reasons in support of the order already made dismissing the application with costs.

Application dismissed.

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BHAGABATI PRASAD BANERJEE, J.

Mrs. Mukti Maitra, Petitioner v. State of West Bengal, Respondent.

C.O. No. 565(W) of 1985, D/- 26-3-1985.

Constitution of India, Arts. 226, 299 and 14 — Contractual obligation of Govt. — Govt. cannot act arbitrarily — Advocate spending his own money for conducting case on behalf of State Govt. in Supreme Court — Amount spent by Advocate admitted by Govt. as payable — Govt. cannot withhold payment arbitrarily — High Court issued writ of Mandamus commanding Govt. to make payment within fixed time.

DC/FC/C79/85/GNB/VCD