of allotment to the applicants is concerned, the Tribunal has directed that the matter is governed by the majority judgment pronounced by it on September 5, 1991 in Original Application No. 214 of 1988 (*G. Ramachandra Reddy* v. *Union of India and others*). Following the said majority judgment, the Tribunal directed the Union of India to fix the year of allotment of the said applicants taking December 28, 1982 as the dates of their continuous officiation in senior posts in accordance with the Rule. It is obvious that the said direction must be understood and acted upon in accordance with the principle enunciated in paras 14 to 16 of the judgment in *Syed Khalid Rizvi* and in this judgment (in Civil Appeal No. 2177 of 1988).

21. The appeal is accordingly dismissed. No costs.

22. In *Civil Appeal No.* 397 *of* 1994, *S.L.P.* (*C*) *No.* 9637 *of* 1992.—Leave granted.

23. In this case too, the Tribunal has directed the Union of India to det rmine the year of allotment to which the original applicants (impleaded as Respondents 1 and 2 in this appeal) are entitled to. The said two respondents (original applican s) were included in the select list on November 4, 1981. The first applicant, Sri K. Rushiya Rao was posted on August 21, 1981 in a cadre post in which he continued to officiate till he was appointed to I. P. S. on October 17, 1984. So far as the other applicant, Sri R. C. Venkateshwarlu is concerned, he was posted in a cadre post only on June 9, 1983 wherein he continued to officiate till his appointment to I. P. S. on October 17, 1984. So far as K. Rushiya Rao is concerned, the Tribunal has directed that November 4, 1981 should be taken as the relevant date for the purpose of determining his year of allotment. In the case of R. C. Venkateshwarlu, however, it was of the opinion that a strict application of Explanation (I) to Rule 3(3) would result in grave injustice to the said respondent for the several reasons stated by it and, therefore, it recommended that a relaxation may be granted to him so as to enable him to treat November 4, 1981 as the relevant date for determining his year of allotment. We have not been pursuaded to hold that the directions made by the Tribunal are in any manner contrary to law.

24. The appeal is accordingly dismissed. No costs.

(*Appeal dismissed.*)

(1994) 1 S. C. J. 657

(From the Cal. High Court)

HON'BLE S. C. AGRAWAL AND M. K. MUKHERJEE, JJ.

R. M Investment & Trading Co. Pvt. Ltd. *Petitioner*

Versus

Boeing Co. and another *Respondents*

[*Special Leave Petition* (*Civil*) *No.* 20139 *of* 1993]

WITH

[*Special Leave Petition* (*Civil*) *Nos.* 121-22 *of* 1994, *all decided on the* 10*th February*, 1994]

Foreign Awards (Recognition & Enforcement Act, 1961, Sections 2 and 3 —Expression "commercial"—Used in Section 2—Meaning of—Explained—

Agreement between R. M. Investment and Trading Co. Pvt. Ltd. and Boeing Co.—For consultancy services—Held, to be of commercial nature.

While construing the expression "commercial" in Section 2 of the Act it has to be borne in mind that the "Act" is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction." (See *Renusagar Power Co. Ltd.* v. *General Electric Co. and another*, and *Koch Nevigation* v. *Hindustan Petroleum*). The expression "commercial" should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today. [Para 12]

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

From the terms of the agreement it appears that the R. M. Investment and Trading Company Pvt. Ltd. (R.M.I.) rendered consultancy Services to the Boeing Company (Boeing) as an independent contractor. The said services were for promoting the sales of new Boeing Model 737, 747, 757 and 767 types of aircrafts in India and to assist Boeing in the sale of such aircrafts. While R.M.I. was entitled to payment of compensation for such services, the costs, expenses and charges necessary or incidental to R.M.I.'s operations were to be borne by R.M.I. [Para 11]

It is not disputed that the sale of aircrafts by Boeing to customers in India was to be a commercial transaction. The question is whether tendering of consultancy services by R.M.I. for promoting such commercial transaction as consultant under the Agreement is not a "commercial transaction". This Court is of the view that the High Court was right in holding that the agreement to render consultancy services by R.M.I. to Boeing is commercial in nature and that R.M.I. and Boeing do stand in commercial relationship with each other. [Para 12]

It is, thus, clear that in the present case, the consultant (R.M.I.) was required to play an active role in promoting the sale of the aircraft of Boeing to customers and was required to provide "commercial and managerial assistance and information which may be helpful to Boeing's sales efforts with customers". This would show that relationship between R.M.I. and Boeing was commercial in nature. [Para 17]

Case law.- (1985) 1 SCR 432 ; 1989 Supp. (1) SCR 70—**Relied on** ; 1982 (1) CLJ 511 and AIR 1965 Bom 114—**Distinguished** ; (1961) 1 SCR 809 ; (1977) 2 SCR 828—**Cited.**

Enunciation of Law

CONSULTANCY SERVICES

—Are commercial in nature.

Counsel : Mr. Shanti Bhushan, Sr. Advocate, for the Petitioner.

Mr. N. A. Palkiwala and Mr. N. N. Gooptu, Sr. Advocates for the Respondents.

JUDGMENT

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

2. R. M. Investment and Trading Co. Pvt Limited (for short "R.M.I."), the petitioner in these petitions, is a company incorporated under the Companies Act, 1956. Sometime in or around 1986, R. M. I. entered into an agreement with Boeing Company (for short "Boeing"), a company incorporated under the laws of the State of Delaware in the United States of America, whereunder R.M.I. agreed to provide Boeing with consultant services for promotion of sale of Boeing aircrafts in India. The said agreement was initially to be operative till December 31, 1986, but by subsequent agreement it was extended till April 30, 1987. In August, 1987, Definitive Purchase Agreements for purchase of two aircrafts were executed between Boeing and Air India, a body corporate constituted under the Air Corporation Act, 1953. R.M.I. claimed commission from Boeing on the said transaction but Boeing refused to pay the same and thereupon in April, 1990, R.M.I. filed a suit [Suit No. 363 of 1990] on the Original Side of the Calcutta High Court aginst Boeing for the recovery of US $ 17.5 million equivalent to Rs. 10,07,12,500,00 by way of compensation and remuneration on the basis of the terms of Consultant Services Agreement alongwith other incidental reliefs. The Consultant Services Agreement contains (in paragraph 10) an arbitration clause which provides that "any controversy or claim arising out of or relating to this agreement, or any breach thereof, which the parties have not been able with due diligence to settle amicably, shall be settled by arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association." In the said suit R.M.I. filed an application for injunction and an interim order was passed by a learned Single Judge of the High Court on July 17, 1992, whereby it was directed that if any payment is made by Air India to Boeing, Boeing shall retain a sum of U. S. $ 17.5 million with Air India. On August 13, 1992, Boeing moved an application under Section 3 of the Foreign Awards (Recognition & Enforcement) Act, 1961 (hereinafter referred to as the 'Act') for the stay of the said suit on the ground that the subject-matter of the suit was covered by the arbitration clause and that Boeing was willing to do everything necessary for the proper conduct of the arbitration. On the same date R. M. I. filed an application for amendment of the plaint and for addition of Air India as a party defendant to the suit. On August 14, 1992, learned trial Judge passed an order staying the suit and all proceedings except the pending interlocutory application. On August, 18, 1992, Boeing moved an application for vacating the interim order passed on July 17, 1992. By order dated April 5, 1993, the learned trial Judge dismissed the application filed by Boeing for staying the suit. Boeing filed an appeal [Appeal No. 295 of 1993] against the said order of the learned trial Judge. The said appeal has been allowed by a Division Bench of the High Court by judgment dated October 14, 1993. Special Leave Petition (Civil) No. 20139 of 1993 is directed against the said judgment of the Division Bench of the High Court.

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

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

5. We will first take up Special Leave Petition (Civil) No. 20139 of 1993 which is directed against the judgment dated October 14, 1993, whereby the application filed by Boeing under Section 3 of the Act has been allowed and the proceedings in the suit filed by R.M.I. have been stayed. In the said judgment the Division Bench of the High Court has held that in view of the definition of the expression 'foreign award' contained in Section 2 of the Act, a suit cannot be stayed under Section 3 unless the Court is satisfied that the parties to the arbitration agreement stand in such legal relationship to each other which can be considered as "commercial". The learned Judges have constructed the word "commercial" in the light of the decisions of this Court in *Atiabari Tea Co. Ltd.* v. *The State of Assam and others*, 1961(1) SCR 809, and *Fatehchand Himmatlal and others* v. *State of Maharashtra, Etc.*, 1977(2) SCR 828, and the Model Law prepared by UNCITRAL and have held that "the transaction between R.M.I. and Boeing is commercial and they do stand in commercial relationship" and, on that view, it has been held that the suit is liable to be stayed under Section 3 of the Act since the conditions required to be fulfilled for the application of Section 3 as indicated by this Court in *Renusagar Power Company Ltd.* v. *General Electric Company and another*, 1985(1) SCR 432, are fulfilled in the case.

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

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

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

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

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

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

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

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

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

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

(Emphasis supplied)

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

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

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

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

(b) to pay Consultant compensation for Consultant's performance of this Agreement in the amount and under the circumstances described in paragraphs 5 and 8 herein ; provided, however, if any Customer or any Relevant Government prohibits or limits in any manner the amount of compensation which may be paid to Consultant pursuant to this Agreement, then notwithstanding any other provision in this Agreement to the contrary, Boeing shall not be obligated to pay Consultant any compensation in excess of such prohibition or limitation. In no event shall Boeing be obligated to pay Consultant any more compensation than that specified in paragraph 5."

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

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

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

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

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

11. From the terms of the Agreement referred to above it appears that R.M.I. rendered consultancy services to Boeing as an independent contractor. The said services were for promoting the sales of new Boeing Model 737, 747, 757 and 767 types of aircrafts in India and to assist Boeing in the sale of such aircrafts. While R.M.I. was entitled to payment of compensation for such services, the costs, expenses and charges necessary or incidental to R.M.I.'s operations were to be borne by R.M.I.

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

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

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

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

15. In *Micoperi S. P. A.* v. *Sansouci Pvt. Ltd.* (supra) a learned Single Judge of the Calcutta High Court has construed the term "commercial" in the light of the provisions contained in Rule 1 of Chapter XII of the Rules of the Original Side of the Calcutta High Court which specifies the nature of suits covered by the expression "commercial suits". We do not find any reason for thus restricting the meaning of the term "commercial" in Section 2 of the Act on the basis of the provisions contained in the Rules of the High Court.

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

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

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

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

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

21. Coming to S. L. P. (Civil No. 121-122 of 1994 which are directed against the judgment of the Division Bench of the High Court dated December 21, 1993, setting aside the order of learned Single Judge allowing the application for amendment of the plaint as well as the impleadment of Air India as defendant, we find that on April 19, 1993, the Division Bench of the High Court, while admitting Appeal number 295 of 1993 against the order of the learned Single Judge dated April 5, 1993 rejecting the application for stay of

the suit under Section 3 of the Act, had passed on interim order in the following terms :

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

22. Inspite of the said interim order the learned Single Judge dealt with application for amendment and passed the order allowing the said application on July 13, 1993. The only contention that was urged before the Division Bench of the High Court was that the interim order dated April 19, 1993, did not preclude the learned Single Judge from dealing with the application for amendment and that he was competent to pass interlocutory orders in the suit. The Division Bench of the High Court has, however, found that in view of the said order passed by the Court on April 19, 1993, the trial Court no longer had any jurisdiction to proceed in respect of the suit in any way whatsoever and could not proceed with the hearing of the amendment application and to allow the amendment of the plaint. The Division Bench has further observed that "no specific order staying the hearing of the amendment application was passed by the Court for the reason that the Court was granting stay of the suit itself and it is not necessary to pass any specific order in respect of any interlocutory proceeding in the suit." We do not find any infirmity in the said approach of the Division Bench of the High Court. S.L.P. (Civil) Nos. 121-22 of 1994 are also liable to be dismissed.

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

(*Special appeals dismissed.*)

(1994) 1 S. C. J. 664

(From the A. P. High Court)

HON'BLE S. MOAHN AND M. K. MUKHERJEE, JJ.

Kranti Swaroop Machine Tools Pvt. Ltd. & Anr. *Appellants*

Versus

Smt. Kanta Bai Asawa & Ors. *Respondents*

[*Civil Appeal Nos. 5252-5255 of 1993, decided on the 27th January, 1984*]]

Rent Control—Eviction for default in payment of rent—Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, Section 7(2)—Suit for eviction—On ground of default in payment of rent—There was only non-payment of Municipal tax—Rent deed showing that Municipal taxes were also payable with rent—In the instant case, there was a deposit of Rs. 10,000 by tenant with landlady—This deposit was against law—Thus, landlady was entitled to deduct Municipal taxes from that deposit and in such a situation question of arrears of rent—Vanishes—Eviction, therefore, illegal.

Under Section 7(2)(a) of Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, the landlady is forbidden to receive any premium or other like sums in excess of the agreed rent. [Para 8]

In the instant case, under clause 3 of the rent deed the tenant had deposited with the landladies a sum of Rs. 10,000. That deposit was not to carry any interest. It could be adjusted at the termination of tenancy towards the rent, light bills and damages which may be found due. This

454. INDIA: SUPREME COURT – 10 February 1994 – R.M. Investment & Trading Co. Pvt. Ltd. v. Boeing Co. and another

Effects of an arbitration agreement on judicial proceedings – Matters considered as commercial

(See Part I.A.4 and B.1)

(The decision reproduced in Part V.452 was given in the same case)

JUDGMENT

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

2. R. M. Investment and Trading Co. Pvt Limited (for short "R.M.I. "), the petitioner in these petitions, is a company incorporated under the Companies Act, 1956. Sometime in or around 1986, R. M. I. entered into an agreement with Boeing Company (for short "Boeing"), a company incorporated under the laws of the State of Delaware in the United States of America, whereunder R.M.I. agreed to provide Boeing with consultant services for promotion of sale of Boeing aircrafts in India. The said agreement was initially to be operative till December 31, 1986, but by subsequent agreement it was extended till April 30, 1987. In August, 1987, Definitive Purchase Agreements for purchase of two aircrafts were executed between Boeing and Air India, a body corporate constituted under the Air Corporation Act, 1953. R.M.I. claimed commission from Boeing on the said transaction but Boeing refused to pay the same and thereupon in April, 1990, R.M.I. filed a suit [Suit No. 363 of 1990] on the Original Side of the Calcutta High Court aginst Boeing for the recovery of US $ 17.5 million equivalent to Rs. 10,07,12,500,00 by way of compensation and remuneration on the basis of the terms of Consultant Services Agreement alongwith other incidental reliefs. The Consultant Services Agreement contains (in paragraph 10) an arbitration clause which provides that "any controversy or claim arising out of or relating to this agreement, or any breach thereof, which the parties have not been able with due diligence to settle amicably, shall be settled by arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association." In the said suit R.M.I. filed an application for injunction and an interim order was passed by a learned Single Judge of the High Court on July 17, 1992, whereby it was directed that if any payment is made by Air India to Boeing, Boeing shall retain a sum of U. S. $ 17.5 million with Air India. On August 13, 1992, Boeing moved an application under Section 3 of the Foreign Awards (Recognition & Enforcement) Act, 1961 (hereinafter referred to as the 'Act') for the stay of the said suit on the ground that the subject-matter of the suit was covered by the arbitration clause and that Boeing was willing to do everything necessary for the proper conduct of the arbitration. On the same date R. M. I. filed an application for amendment of the plaint and for addition of Air India as a party defendant to the suit. On August 14, 1992, learned trial Judge passed an order staying the suit and all proceedings except the pending interlocutory application. On August, 18, 1992, Boeing moved an application for vacating the interim order passed on July 17, 1992. By order dated April 5, 1993, the learned trial Judge dismissed the application filed by Boeing for staying the suit. Boeing filed an appeal [Appeal No. 295 of 1993] against the said order of the learned trial Judge. The said appeal has been allowed by a Division Bench of the High Court by judgment dated October 14, 1993. Special Leave Petition (Civil) No. 20139 of 1993 is directed against the said judgment of the Division Bench of the High Court.

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

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

5. We will first take up Special Leave Petition (Civil) No. 20139 of 1993 which is directed against the judgment dated October 14, 1993, whereby the application filed by Boeing under Section 3 of the Act has been allowed and the proceedings in the suit filed by R.M.I. have been stayed. In the said judgment the Division Bench of the High Court has held that in view of the definition of the expression 'foreign award' contained in Section 2 of the Act, a suit cannot be stayed under Section 3 unless the Court is satisfied that the parties to the arbitration agreement stand in such legal relationship to each other which can be considered as "commercial". The learned Judges have constructed the word "commercial" in the light of the decisions of this Court in *Atiabari Tea Co. Ltd.* v. *The State of Assam and others*, 1961(1) SCR 809, and *Fatehchand Himmatlal and others* v. *State of Maharashtra, Etc.*, 1977(2) SCR 828, and the Model Law prepared by UNCITRAL and have held that "the transaction between R.M.I. and Boeing is commercial and they do stand in commercial relationship" and, on that view, it has been held that the suit is liable to be stayed under Section 3 of the Act since the conditions required to be fulfilled for the application of Section 3 as indicated by this Court in *Renusagar Power Company Ltd.* v. *General Electric Company and another*, 1985(1) SCR 432, are fulfilled in the case.

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

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

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

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

> "2.1 During the term of this agreement and strictly subject to the limitations of paragraph 3. Consultant shall :
>
> (a) use consultant's best efforts to promote the sale (as defined in paragraph 2.2) of Aircraft to customers ;
>
> (b) promptly inform Boeing whenever a Customer is interested in discussing the purchase of Aircraft, and at Boeing's request, arrange to bring Boeing and such customer together for negotiations ;
>
> (c) provide any cultural, commercial and managerial assistance and information which may be helpful to Boeing's Sales efforts with Customers.
>
> (d) render such assistance as Boeing may reasonably require in concluding contracts with customers for the sale of Aircraft ; and
>
> (e) maintain whatever organisation and resources are reasonably necessary for providing the aforementioned services."
>
> (Emphasis supplied)

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

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

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

> "(a) to furnish consultant from time to time with such promotional date and other information as Boeing deems necessary for the performance of Consultant's obligations under this Agreement ; and
>
> (b) to pay Consultant compensation for Consultant's performance of this Agreement in the amount and under the circumstances described in paragraphs 5 and 8 herein ; provided, however, if any Customer or any Relevant Government prohibits or limits in any manner the amount of compensation which may be paid to Consultant pursuant to this Agreement, then notwithstanding any other provision in this Agreement to the contrary, Boeing shall not be obligated to pay Consultant any compensation in excess of such prohibition or limitation. In no event shall Boeing be obligated to pay Consultant any more compensation than that specified in paragraph 5."

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

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

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

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

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

11. From the terms of the Agreement referred to above it appears that M.I. rendered consultancy services to Boeing as an independent contractor. ie said services were for promoting the sales of new Boeing Model 737, 747, 7 and 767 types of aircrafts in India and to assist Boeing in the sale of such rcrafts. While R.M.I. was entitled to payment of compensation for such rvices, the costs, expenses and charges necessary or incidental to R.M.I.'s perations were to be borne by R.M.I.

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

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

> "Trade and commerce do not mean merely traffic in goods, i. e., exchange of commodities for money or other commodities, In the complexities of modern conditions, in their sweep are included carriage of persons and goods by road, rail, air and waterways, contracts, banking, insurance, transactions in the stock exchanges and forward markets, *communication of information*, supply of energy, postal and telegraphic services and many more activities—too numerous to be exhaustively enumerated which may be called commercial intercourse." (Emphasis supplied)

(*Atiabari Tea Co. Ltd.* v. *The State of Assam and others*, 1961 (1) SCR 809, at p. 874, Shah, J.)

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

15. In *Micoperi S. P. A.* v. *Sansouci Pvt. Ltd.* (supra) a learned Single Judge of the Calcutta High Court has construed the term "commercial" in the light of the provisions contained in Rule 1 of Chapter XII of the Rules of the Original Side of the Calcutta High Court which specifies the nature of suits covered by the expression "commercial suits". We do not find any reason for thus restricting the meaning of the term "commercial" in Section 2 of the Act on the basis of the provisions contained in the Rules of the High Court.

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

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

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

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

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

21. Coming to S. L. P. (Civil No. 121-122 of 1994 which are directed against the judgment of the Division Bench of the High Court dated December 21, 1993, setting aside the order of learned Single Judge allowing the application for amendment of the plaint as well as the impleadment of Air India as defendant, we find that on April 19, 1993, the Division Bench of the High Court, while admitting Appeal number 295 of 1993 against the order of the learned Single Judge dated April 5, 1993 rejecting the application for stay of

the suit under Section 3 of the Act, had passed on interim order in the following terms :

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

22. Inspite of the said interim order the learned Single Judge dealt with application for amendment and passed the order allowing the said application on July 13, 1993. The only contention that was urged before the Division Bench of the High Court was that the interim order dated April 19, 1993, did not preclude the learned Single Judge from dealing with the application for amendment and that he was competent to pass interlocutory orders in the suit. The Division Bench of the High Court has, however, found that in view of the said order passed by the Court on April 19, 1993, the trial Court no longer had any jurisdiction to proceed in respect of the suit in any way whatsoever and could not proceed with the hearing of the amendment application and to allow the amendment of the plaint. The Division Bench has further observed that "no specific order staying the hearing of the amendment application was passed by the Court for the reason that the Court was granting stay of the suit itself and it is not necessary to pass any specific order in respect of any interlocutory proceeding in the suit." We do not find any infirmity in the said approach of the Division Bench of the High Court. S.L.P. (Civil) Nos. 121-22 of 1994 are also liable to be dismissed.

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

(Special appeals dismissed.)

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452. INDIA: HIGH COURT OF CALCUTTA – 5 April 1993 – *Boeing Company v. R.M. Investment & Trading Co. Pvt. Ltd.* *

Effects of an arbitration agreement on judicial proceedings – Matters considered as commercial

(See Part I.A.4 and B.1)

ORDER :— This is an application under S. 3 of the Foreign Awards (Recognition & Enforcement) Act, 1961, inter alia, praying for an order that Suit No. 363 of 1990 (R. M. Investment & Trading Co. Pvt. Ltd. v. Boeing Company), filed by the respondent be stayed and for further reliefs.

2. The petitioner's case is that the respondent, R. M. Investment & Trading Co. Pvt. Ltd., was appointed by the petitioner under a Consultant Service Agreement dated 1-1-86. Under the said agreement, the respondent was to be paid on annual retainer and in addition was entitled to 5% commission for the sale of each aircraft made during the term of agreement. The agreement was to remain in force until 31-12-86. Certain provisions of the agreement was subsequently modified and its terms were extended for a limited period up to 30-4-87. The said arbitration agreement expressly provided that the respondent shall not receive any compensation for sale of aircraft concluded after 30-4-87. Both the original agreement and the modified agreement were partly executed in Calcutta.

3. On 16-7-92, the petitioner came to know that the respondent has instituted a suit being Suit No. 363 of 1990 before this Court praying for a decree for U.S. Dollars 17.5 Million equivalent to Rs. 10,07,12,500/- being the 5% commission payable under the agreement for sale of aircraft. The said suit was filed by the respondent in breach of its contractual obligation to refer all controversies or claims arising out of or relating to the agreement to arbitration as per Clause 10 of the agreement. The further case of the petitioner is that the entire subject-matter of the Suit No. 363 of 1990 is covered by the arbitration clause in the agreement.

* The text is reproduced from *All India Reporter, Calcutta Section*, p. 184 ff. (1993)

4. In the month of July, 1992 the respondent filed an interim application and by order dated 17-7-92 this Hon'ble Court passed the following order :—

"Without prejudice to the rights and contentions of the parties, let the affidavit-in-opposition be filed by 2-9-92, afffidavit-in-reply by 15-9-92 and the matter is adjourned till 17-9-92. In the meantime, if any payment is made by the Air India to the respondent, the respondent shall retain a sum of 17.5 Million U.S. Dollars with Air India. Liberty is given to the respondent to make an application for vacating this interim order.

The matter is heard in part and will appear in the list on 17-9-92.

All parties concerned to act on a signed copy of the minutes of this order and the usual undertaking."

The petitioner took no steps in the said suit and/or proceeding and filed the present application for stay of the said suit, as the subject-matter of the said suit is covered by the arbitration clause. The petitioner's further case is that the petitioner is ready and willing to do everything necessary for the proper conduct of the arbitration and the said suit should be stayed.

5. The respondent filed an affidavit-in-opposition and it is stated in the affidavit-in-opposition that the arbitration agreement is inoperative in the facts of the case. The respondent's case is that the petitioner had entered into a conspiracy with Air India with a sinister object of depriving the respondent of the compensation receivable by the respondent in connection with the sale of two Boeing 747 Aircrafts, which the Air India purchased from the petitioner. The Letters of Intent were issued in January, 1987. The respondent rendered services to the petitioner by negotiating about the sale of aircraft of the petitioner to Air India and various steps were taken on different dates and even after 30-4-87 several meetings in New Delhi between 1-5-87 and 25-6-87 were arranged with the representatives of the petitioner and the Government of India and travel to Hawai in July, 1987 for the purpose of consulting with the petitioner concerning the pending transaction and the respondent had occasion to go to the Headquarters in Seattle Washington, for the purpose of advancing the same. The respondent also attended at the closing of the definitive purchase agreements in Bomby on 7-8-87 and provided information, advice and other services to the petitioner at the specific request of the petitioner in November, 1987. The respondent was performing the services even after the expiry of the contract at the instance of the petitioner and the petitioner consistently reiterated its intention to pay the compensation rightfully earned by the respondent upon conclusion of the sale. The petitioner did not disclose the letter dated 30-4-87 nor gave any reason for withholding the payment of the amount of compensation/commission to the respondent. The respondent, was totally suprised to see the contents of the letter dated 30-4-87 which is set out hereunder :—

"AIR INDIA
AIR INDIA BUILDING, NARIMAN POINT, BOMBAY 400 021

R. N. TATA
CHAIRMAN

April 30, 1987.

Boeing Commercial Airplane Company
P.O. Box 3707,
Seattle,
Washington 98124
U.S.A.

Attn: Mr. Larry S. Dickenson
Vice President-International Sales.

Dear Sirs,

It is Air-India's policy, as established by the Government of India, that no contingent fees, commission or consultancy fees will be paid to any agent, consultant, advisor or representative in India or abroad in connection with the sale of the two (2) Model 747-300 combi and the one (1) Model 747-200 passenger aircraft.

Your faithfully,
AIR-INDIA
Sd/-
Ratan N. Tata."

Thereafter the respondent addressed a letter to the Government of India and Mr. C. B. Gautam, Private Secretary to the Prime Minister of India, sent a letter dated 20-6-91 confirming that there is no policy of the Government of India as alleged in the letter dated 30-4-87. The respondent's further case is that the petitioner procured the letter dated 30-4-87 from Air India with the sinister object of creating grounds for non-payment of compensation/commission to the respondent in respect of the sale of the aircraft, the value whereof is 350 Million U.S. Dollar approximately. Respondent's further case is that there was no policy of the Government of India and/or Air India for non-payment of the consultancy charges. On the contrary, the respondent was appointed as consultant under the agreement dated 1-1-86 and the Air India sent a Telex to the petitioner at Seattle on 4-12-86 and a subsequent letter dated 9-12-86 stating that the Government of India has approved the proposal of Air India for payment of refundable U.S. Dollar 2,00,000 per aircraft and a resolution for payment of such deposit was passed by the Board of Directors of Air India and the same was followed by two Letters of Intent dated 14-1-87 and 22-1-87. The further case of the respondent is that on 24-4-87 Mr. Ratan N. Tata, Chairman of Air India, clearly stated in the presence of the Managing Director, Deputy Managing Director and two members of the Board of Directors of Air India, that there was no intention to prohibit the petitioner from engaging whosoever they felt necessary and yet there was no objection raised on behalf of Air India that it was the policy of the Air India that there should be no advisor or consultant and no commission or consultancy charges should be payable to the advisor or consultant and the engagement of the respondent as consultant was in violation of Air India's policy. The further case of the respondent is that the petitioner and Air India have practised fraud upon the respondent by bringing into existence the letter dated 30-4-87 and the said fact and/or matter cannot be the subject matter of arbitration.

6. The respondent filed an application for amendment of the plaint by the Master's summons taken out on 13-8-92 and in the said amendment application the respondent prayed for addition of Air India as party defendant and has also claimed a money decree against Air India. The present application under S. 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 was filed on 12-8-92 and the same was made returnable on 14-8-92. The amendment application filed in the said suit is pending. It is further submitted by the respondent that the Hon'ble Court has jurisdiction and power to compel production of documents and records of Air India and the respondent will be in a position to get the relevant documents produced by issue of subpoena. In foreign arbitration no subpoena can be issued on Air India for production of documents and the respondent will be seriously handicapped and will be seriously prejudiced if the arbitration proceeding is allowed to be held. The expenses involved in the arbitration proceedings will also be prohibited and it would be optional for Reserve Bank of India to release foreign exchange for conducting the arbitration proceedings in U.S.A. Witnesses from Air India particularly Mr. Ratan Tata, the then

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Deputy Managing Director of Air India and the officers of the Prime Minister's Office who had issued the letter will not be available as witnesses in the arbitration proceedings at U.S.A. as the arbitrator will not be able to compel their attendance whereas in the suit it would be possible for the respondent to secure their evidence. If the suit is stayed and if the arbitration proceedings takes place, then there would be a complete denial of justice and as such the arbitration proceedings and/or agreement is incapable of being performed.

7. Mr. Roy Chowdhury, learned senior Counsel appearing for the petitioner, referred to S. 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 and submitted that the provision is mandatory and the Court shall pass an order staying the proceedings unless the Court is 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. It is submitted by Mr. Roy Chowdhury that so far as S. 34 of the Indian Arbitration Act is concerned, there is a discretion left to the Court for staying the proceedings. S. 34 of the Indian Arbitration Act reads as follows :—

"Power to stay legal proceedings where there is an arbitration agreement. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 reads as follows :

"Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to an agreement to which Art. 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 arbitration agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, 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 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 make an order staying the proceedings."

It is submitted by Mr. Roy Chowdhury that if the Court is satisfied that the agreement is not null and void and operative and incapable of being performed and the disputes between the parties are matters agreed to be referred, then no discretion is left to the Court and the Court is bound to stay the suit and its proceedings and while considering application under S. 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 the Court will only see the agreement containing the arbitration clause and the statements made in the plaint and if the Court finds that the disputes raised in the suit are subject matter of the arbitration i.e. arbitration agreement, then the Court has no option but to stay the suit and the proceedings connected therewith. It is further submitted by Mr. Roy Chowdhury that the Court cannot look into any other provision or statement or should not and cannot even consider the statements made in the affidavit-in-opposition filed by the respondent. The only thing the Court is entitled to look into and consider is the statement made in the plaint. So far as the proposed amendment of the plaint is concerned, that has nothing to do with the present proceedings as by the proposed amendment the respondent No. 1 is trying to enlarge the scope of the suit and bring out some new facts constituting fresh cause of action and since the amendment application

has not yet been allowed, the Court should not look into the averments made in the amendment application.

8. Mr. Roy Chowdhury refers to a decision in the case of Renusagar Power Co. Ltd. v. General Electric Company reported in AIR 1985 SC 1156. In the said decision it has been held that the conditions required to be fulfilled for invoking S. 3 of the Foreign Awards Act are :

"(i) there must be an agreement to which Art. II of the Convention set forth in the Schedule applies;

(ii) a party to that agreement must commence legal proceedings against another party thereto;

(iii) the legal proceedings must be "in respect of any matter agreed to be referred to arbitration" in such agreement;

(iv) the application for stay must be made before filing the written statement or taking any other step in the legal proceedings;

(v) the Court has to be satisfied that the agreement is valid, operative and capable of being performed; this relates to the satisfication about the 'existence and validity' of the arbitration agreement;

(vi) the Court has to be satisfied that there are disputes between the parties with regard to the matters agreed to be referred; this relates to effect (scope) of the arbitration agreement touching the issue of arbitrability of the claims.

It is submitted by Mr. Roy Chowdhury that the Court has to examine whether these conditions are fulfilled or not and the Supreme Court has laid down the principle that if the conditions are fulfilled, then the suit should be stayed, Mr. Roy Chowdhury has relied upon a decision in the case of M/s. Koch Navigation Inc. v. M/s. Hindustan Petroleum Corporation Ltd. reported in (1989) 4 SCC 259 : (AIR 1989 SC 2198), wherein it has been held by Sabyasachi Mukherji and B.C. Ray, JJ. that "the award must be executed as it is and there is no scope for any addition to any award in executing a foreign award but the award to be executed must be properly construed and given effect to. If the award is ambiguous, the Court has jurisdiction to determine what it means. In this case, the award is not ambiguous. It is clear that the costs of reference should be paid by the respondent charterers and that such costs should be paid as are determined by agreement between the parties and in case of failure of the agreement by the taxation. There being disagreement such and had been taxed and were placed before Division Bench of the High Court before it pronounced its judgment. There is no evidence of any delay or laches on the part of the appellant, as such, which would disentitle the appellant to such costs. Under the Act, if an application is filed for decree in terms of the award, the Court in upholding the award ought to grant a decree in terms of the award and not substract any portion thereof. Since the award directed costs of appellant's reference to be paid as is mutually agreed upon or as taxed, the Division Bench of the High Court ought to have passed an order for costs as taxed."

9. Mr. Roy Chowdhury also relied upon a decision in the case of Ramji Dayawala & Sons (P) Ltd. v. Invest Import reported in AIR 1981 SC 2085, where it has been held that "when parties by contract agree to arrange for settlement of their disputes by a Judge of their choice, by procedure of arbitration voluntarily agreed upon, ordinarily the Court must hold the parties to their bargain. As a corollary, if a party to a subsisting arbitration agreement in breach or violation of the agreement to refer dispute to arbitration approaches the Court, the Court would not lend its assistance to such a party and by staying the suit compel the party in breach to abide by its contract. When the parties have agreed to an arbitration by a foreign arbitral tribunal the case for stay would be stronger than if there was a domestic arbitration agreement. This proceeds on the assumption that parties not only sought and agreed upon the forum for resolution of dispute but also the law according to which the dispute would be resolved. However, this is not an absolute rule. Granting or refusing to grant stay is still a matter within the discretion of the Court. How discretion would be exercised in a given case would depend upon various circumstances.

The entire evidence both of the appellant and the respondents was in this country; the contract as a whole executed and carried out in this country, the claim as a whole arose in this country; the appellant was a company incorporated in this country and the respondent was having its office in this country; and the respondent was not motivated by any principle to have the decision of the foreign arbitral Tribunal at Paris but the principal object of the respondent was merely to make it more difficult, if not impossible, for the appellant to assert the claim. Add to this two other vital considerations, viz. that the cost of arbitration at Paris would be so disproportionately high to the claim involved in adjudication that one would never think of incurring such a huge cost to realise such a sum claimed, and the restriction on the availability of foreign exchange, another vital relevant consideration. The sum total of all these well established circumstances clearly indicated that this was a suit in which when discretion was exercised on well settled judicial considerations no Court would grant stay of the suit filed by the appellant and the stay had to be refused." Mr. Roy Chowdhury has again relied on a decision in the case of Governor General in Council v. Associated Live-Stock Farm (India) Ltd. reported in AIR 1948 Cal 230, wherein it has been held that "the legal proceedings which are sought to be stayed must be in respect of matters which the parties have agreed to refer, that is to say, which come within the terms of the arbitration agreement. If a party brings an action in respect of any matter not agreed to be referred, the Court has no jurisdiction at all to stay the proceedings and the Court will refuse a stay. Further the Court will exercise its discretion and refuse to stay the action in cases where an substantial part of the disputes does not fall within the arbitration agreement and cannot be conveniently separated. It is however not sufficient to induce the Court not to stay the action to show that only a small part of the disputes is outside the arbitration clause. In order to arrive at a conclusion as to whether the action is in respect of matters agreed to be referred, the Court has to examine the arbitration clause and ascertain its ambit and scope. It takes two to make a dispute. If one party bases his claim outside the contracts but the other bases his defence on the contracts the resulting disputes certainly arise out of the contracts."

10. Mr. Roy Chowdhury has further relied on a decision in the case of Johurmull Purasaram v. Louis Dreyfus & Co. Ltd. reported in AIR 1949 Cal 179, wherein it has been held that "in considering the question of stay of suit, the Court is not entitled to go into the question as to what is substantially the nature of the claim. The Court must consider the suit as it is pleaded and framed. If it comes to the conclusion that the suit as pleaded is a suit on the contract or arising out of the contract containing the arbitration clause then the suit should be stayed. But if the suit as pleaded is a suit independent of the contract then the Court has no power to stay the suit although it is satisfied that the frame of the suit is merely a means of avoiding the consequences of alleging the true nature of the claim."

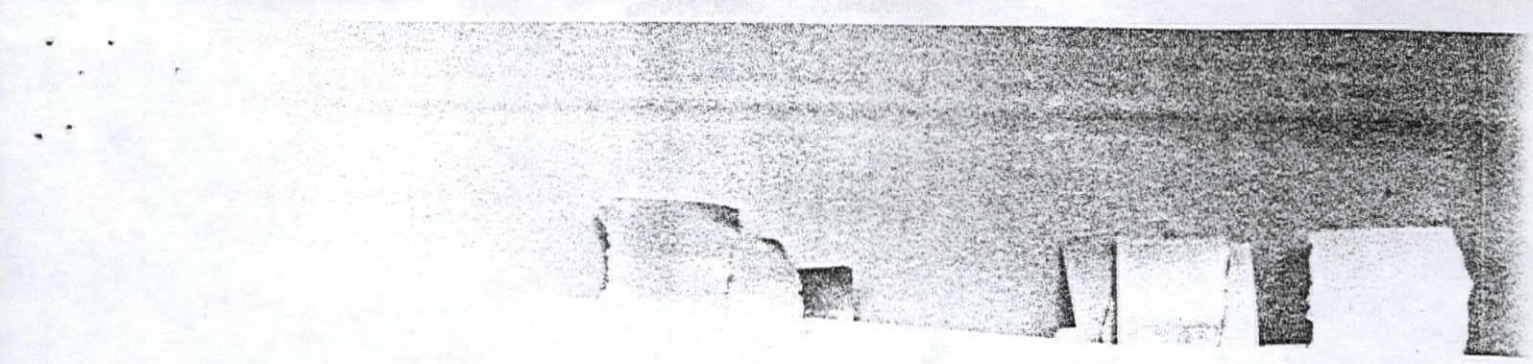
11. Mr. Roy Chowdhury further relied on a decision in the case of I.T.C. Ltd. v. George Joseph Fernandes reported in AIR 1989 SC 839, wherein it has been held that where in an application under S. 34 of the Act an issue is raised as to the validity or existence of the contract containing the arbitration clause, the Court has to decide first of all whether there is a binding arbitration agreement, even though it may involve incidentally a decision as to the validity or existence of the parent contract. The Court has to bear in mind that a contract is an agreement at law and that it is for the parties to make their own contract and not for the Court to make one for them, Court is only to interpret the contract. The stipulations in the contract have therefore to be examined in the light of the dispute raised in the pleadings of the suit. If it is found that the dispute raised in the suit is outside or independent of the contract it follows that the arbitration clause will not encompass that dispute. However as the parties were free to make their own contract they were also free to have agreed as to what matters would be referred to arbitration. If the arbitration clause is so wide as to have included the

very validity or otherwise of the contract on the grounds of fraud, misrepresentations, mutual mistake or any valid reason the arbitrator will surely have jurisdiction to decide even that dispute. Two extreme cases have to be avoided, namely, if simply because there is an arbitration clause all suits including one questioning the validity or existence or binding nature of the parent contract is to be referred to arbitrator irrespective of whether the arbitration clause covered it or not, then in all cases of contracts containing arbitration clause the parties shall be deprived of the right of a civil suit. On the other hand, if despite the arbitration clause having included or covered ex facie even a dispute as to the existence, validity or binding nature of the parent contract to allow the suit to proceed and to deprive the arbitrator of his jurisdiction to decide the question will go contrary to the policy and objects of the Arbitration Act as embodied in Ss. 32, 33 and 34 of the Act. Both the extremes have therefore to be avoided. The proper approach would be to examine the issues raised in the suit and to ascertain whether it squarely falls within the compass of the arbitration clause and take a decision before granting the stay of the suit. If an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the Court has to exercise discretion to decide or not to decide the issue of validity or otherwise of the arbitration agreement even though it may involve incidentally a decision as to validity or existence of the challenged contract. Should the Court find the present contract to be void ab initio or illegal or non-existent, it will be without jurisdiction to grant stay. If the challenged contract is found to be valid and binding and the dispute raised in the suit covered by the arbitration clause, stay of the suit may be justified. In the instant case considering the issues raised, the arbitration clause and surrounding circumstances and the part played by the parties pursuant to the charter party since execution to the modification and thereafter till objection raised by the appellant-plaintiff, we are of the view that the learned trial Court did not err in proceeding to decide the issue of validity or legality of the parent contract."

12. Mr. Roy Chowdhury also relied on a decision in the case of Union of India v. Promode Kumar Agarwalla reported in (1971) 75 Cal WN 767, wherein it has been held that "the contract contains an arbitration clause. In so far as the claim is ex-contracto the claim is clearly within the ambit of the arbitration clause. In so far as the claim is under S. 70 of the Contract Act, the transactions out of which the claim arises were entered into by reason of the contract and are referable to the contract. In any event there is a sufficiently close connection between the claim under S. 70 and the transaction covered by the contract to bring the claim within the arbitration clause. Merely by pleading that the claim arises under quantum or under S. 70 of the Indian Contract Act, a party cannot avoid arbitration." Mr. Roy Chowdhury further has relied on a decision in the case of Shalimar Paints Ltd. v. Omprokash Singhania reported in AIR 1967 Cal 372, wherein it has been held that "it is open to the Court to decide the question of the validity of the arbitration clause on an application under S. 34 and to come to the decision, the Court has further to decide that there is a valid contract between the parties in which the arbitration clause is contained. As soon as it is held that there is a vaild contract containing an arbitration clause covering the subject matter of the dispute in the suit, the claim in the alternative under Ss. 65 and 70 of the Contract Act becomes nugatory and is of no consequence. Therefore a party to the dispute cannot contend that because of the alternative claim in the plaint made by the other party, the disputes are not covered by the arbitration clause, as they are dehors the contract and there is no valid contract between the parties."

13. Mr. Anindya Mitra, learned Advocate appearing for the respondents submitted that the provision of S. 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 is subject to the provision of S. 2 of the said Act, which is as follows:

Section 2: In this Act, unless there is anything repugnant in the subject or context:—



(a) arbitration agreement means a writ-ten agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;

(b) "award" means an arbitration award;

(c) "court" means a Civil Court having jusrisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under S. 21, include a Small Cause Court;

(d) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character the person on whom the estate devolves on the death of the party so acting;

(e) "reference" means a reference to arbitration."

It is submitted by Mr. Mitter that the provision of S. 3 will be applicable only in those cases, where contract is considered as commercial under the law in force in India. The present contract on which the suit is based is arising out of a contract, which is not a subject-matter of commerce as per the law in force in India and as such the application under S. 3 of the said Act is misconceived and not maintainable in law.

14. Mr. Somnath Chatterjee, senior counsel, appearing for the respondents also submited that unless the conditions laid down in S. 2 of the said Act are applicable, S. 3 of the said Act will not be applicable. Therefore, is the condition precedent for applying the provision of S. 3 the Court will have to be satisfied as to whether the subject-matter of Arbitration is a matter of commerce under the law in force in India, so to say, whether the transaction is commercial or not. If the transaction is not a commercial one, then the provision of S. 3 will not be applicable. Mr. Chatterjee relied on Cls. (i), (iii) and (vi) of the conditions laid down in paragraph 51 of Renusagar's case (supra) reported in AIR 1985 SC 1156. Mr. Chatterjee referred to various portions of the contract and submitted that this is a contract of personal service. On the top of the agreement it is mentioned that this is a "consultant services agreement" and in the recital it is stated that the object of appointing the respondent was to assist the Boeing Company in concluding the contract for sale of their Air Crafts and under the said contract the respondent was the retainer and was entitled to 4,20,000 US dollars, which, Boeing Company had to pay to the consultant. The respondent was appointed by Boeing Company and had to establish an office for providing logestic service in relation to the sale of product of Boeing Company and one of the functions of the respondent was that the consultant shall use literature, datas and informations furnished by the Boeing Company only for furtherance of the objects of the agreement entered into between Boeing Company and the respondent. Under the said contract any claim arising out of the said contract for breach thereof is to be settled amicably and shall be settled in Arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the said Arbitration proceeding shall be conducted in English language in Scattle, Washington, USA by their Arbitrator and the Award of the Arbitrator shall be finally binding upon both the parties and enforceable in any Court having competent jurisdiction. Mr. Somnath Chatterjee relied on a decision in the case of Micoperi S.P.A. v. Sansouci Pvt. Ltd. reported in (1982) I Cal LJ 511, wherein it has been laid down by Dipak Kumar Sen, J. (as he then was) that under the provision of S. 3 of the Act stay of suit was mandatory, where the conditions laid down in S. 3 were satisfied and the Court had no discretion in the matter. However, S. 2 and S. 3 of the Act will have to be read together. The agreement referred to in S. 3 has to involve commercial relationship. But the nature envisaged in S. 2 of the Act is legal relationship between the parties, which must also be commercial in nature applicable in Indian law, as otherwise there will be no application of S. 3 of the said Act. In the said judgment reliance has been placed on a decision in the case of Kamani Engineering Corporation Ltd. v. Societe De Traction Et D' Electricite Societe Anonyme reported in AIR 1965 Bom 114 a [illegible] of

the Bombay High Court in the case of Indian Organic Chemicals Ltd. v. Chemtex Fibres Incorporation reported in AIR 1978 Bom 106, wherein it has been held that Mr. Dab (Deb) also cited the two following decisions of the Bombay High Court — (a) in (6) Kamani Engineering Corporation Ltd. v. Societe De Traction Et. D'Electricite Societe Anonyme, reported in AIR 1965 Bom 114. In this case a single Bench of the Bombay High Court considered S. 2 of the Arbitration (Protocol and Convention) Act, 1937, which is in pari materia with S. 2 of the Successor Act, namely, the Foreign Awards (Recognition and Enforcement) Act of 1961 and held that the same would not apply in the contract in that case where the subject-matter was only provision of technical assistance in electrification of Railways and the dispute arose in respect of fees payable for such assistance. In his judgment the learned Judge observed as follows :

It is difficult to find the exact meaning of the phrase "matters considered as commercial under the law in force in India". Neither side has been able to point out to me any particular law wherein the phrases "commercial" or "matters commercial" have been defined. I apprehend that the intent of the Legislature while using the above phrase was that in matters of commercial contracts foreign arbitrations and awards should be recognised and enforced. 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 S. 2. It is also important to bear in mind that though in the preamble the word "contracts" is used, in the section the phrase is "relating to matters considered as commercial."

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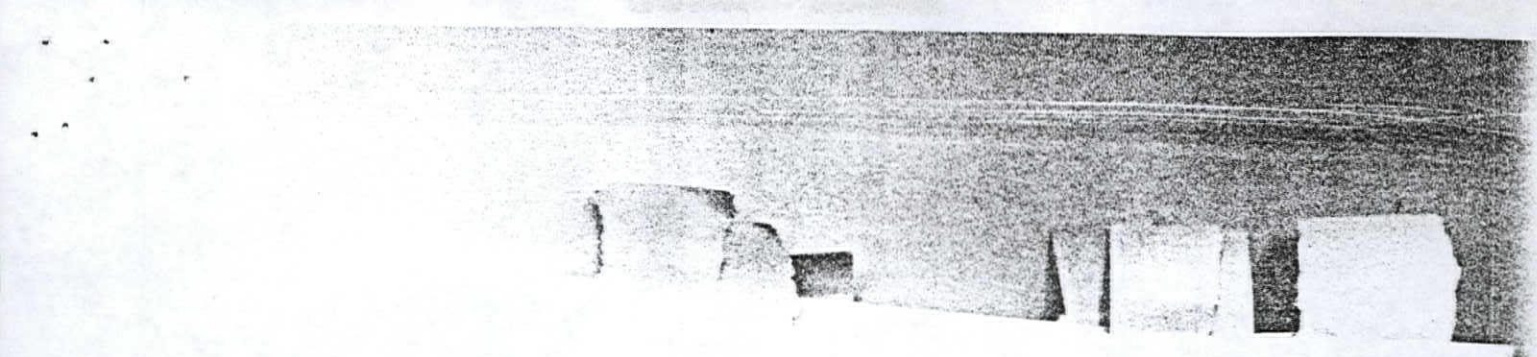
The contract is on the face of it only a contract for technical assistance. The contract does not involve the defendants into any business of the plaintiffs. It is not in any sense participation in profits between the parties. The remuneration of the defendants is for that reason described as "fees" and is only on percentage basis. By this contract, the defendants refused to be involved into any business of the plaintiffs and/or any contracts of t plaintiffs. They have scrupulously kept the selves out of any commercial relations w the plaintiffs. In my view, the contract is mo like a retainer or contract that is ma between a Solicitor, a Counsel and a Advocate on the one hand and a client on t other. It is difficult to describe such a contra as commercial. The learned Judge al observed that S. 3 of the said Act of 193 which is again in pari materia with S. 3 of t Act of 1961 was not mandatory and t expression "shall" in the said section shou be construed as "may" and in appropri cases the Court would be entitled to refu stay of a suit though the other conditions the Section might be satisfied. (b) In Indian Organic Chemicals Ltd. v. Chemt Fibres Incorporation reported in AIR 197 Bom 106. In this case a single Bench of t Bombay High Court construed Ss. 2 and 3 the Foreign Awards (Recognition and E forcement) Act, 1961 and held that for t application of S. 3 of the said Act t agreement involved must be a commerci agreement not as understood in its ordina sense but by virtue of provisions of law force in India. The relevant observations the judgment are as follows :

"The expression occurring in S. 2 is 'leg relationships, whether contractual or no considered as commercial under the law force in India'. It, therefore, follows that no only should the relationship be commerci but such relationship should be 'considered commercial under the law in force in India The use of the word 'under', in my opinion, deliberate and predicates coverage. It posits cloak enveloping an act. In legal parlance t word 'under' connotes 'by virtue of'. It sometimes also translated as 'Pursuant to The expression 'under the law', therefor must mean 'by virtue of a law for the tim being in force.' In other words, before prov sions of S. 3 can be invoked, the agreeme must be an agreement embodying a relatio ship considered commercial under a pro sion of law. In my opinion in order to inv the provisions of S. 3 it is not enough establish that an agreement is commerci



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."

"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 Section 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'. Such an interpretation will have to be eschewed."

It is submitted by Mr. Chatterjee that the Court will have to interpret the agreement and if the Court is satisfied that the agreement is a subject-matter of commercial in law, then and then only the question of applicability of Section 3 of the said Act would arise and while interpreting the agreement the Court will apply the provision of the Indian law and will not take into consideration the provision of the American law, though under the contract the Arbitration proceeding is to be governed by the American law. Mr. Chatterjee has relied on the Conditions (iii) and (vi) in paragraph 51 of Renu Sagar's case (AIR 1985 SC 1156) (supra) and submitted that the disputes between the parties are not covered by the Arbitration agreement. The letter of Mr. Ratan Tata dated 30-4-87, which is the sheet anchor of the petitioner for non-payment of charges and/or remuneration of the respondent No. 1, cannot be a subject-matter of Arbitration, as the same was procured by the petitioner and it is further pointed out, the said letter has no reference number and came into existence mysteriously. It is further submitted by the learned Counsel appearing for the respondent that in each and every letter of Air India there is reference number with 'HQ' etc., but in the letter in question, which is dated 30th April, 1987, there is no reference number. The body of the letter is set out hereinbelow :—

"It is Air India's policy, as established by the Government of India, that no contingent fees, commission or consultancy fees will be paid to any agent, consultant, advisor or representative in India or abroad in connection with the sale of the two (2) Model 747-300 combi and the one (1) Model 747-200 passenger aircraft."

It is again submitted by Mr. Chatterjee that while considering the claim of the respondents the Court will have to consider the service rendered by the respondent No. 1 as consultant for Boeing Company.

Admittedly the consultancy service was rendered even after the expiry of April, 1987. In July, 1987 the respondent No. 1 arranged meeting at Hawai and thereafter on different dates the respondent No. 1 rendered service as a consultant at the instance of the petitioner. So the services rendered was not only within the period as stipulated in the agreement but also beyond the period stipulated in the agreement and as such the same cannot be the subject-matter of arbitration.

15. Mr. Chatterji relied on a decision reported in AIR 1986 Cal 45 (Josef Meisaner GMBR & Co. v. Kanoria Chemicals & Industries Ltd.) where in it has been held that agreement between an Indian Company and foreign firm for supply of technical knowhow and expertise by foreign firm to Indian Company in exchange for payment of 'fee' not a commercial transaction within the meaning of Section 2 of the said Act. It is submitted by Mr. Chatterji that in this act unless the context otherwise requires foreign award means an award on difference between the persons arising out of the local relationships whether contractual or not considered as commercial under the law in force in India. The present agreement which is the subject-matter of the suit is an agreement for rendering services by the respondent No. 1 to the Boeing and it cannot be said that it is a commercial transaction but it is a personal service rendered by the respondent No. 1 to the Boeing. From the letter dated 30th April, 1987 issued by Mr. Ratan Tata it would be clear that the said letter was issued fraudulently and is an outcome of the conspiracy between Air India [illegible] from the letter given by the Secretary to the Prime

Minister it became clear that there was no policy of Government of India and as such there is no basis and/or foundation of the policy of the Government of India and/or Air India as stated in the said letter of Ratan Tata. Furthermore, the letter is of very suspicious character having no reference number and for that the respondent filed an application for production of certain documents. Mr. P. K. Mullick, counsel appeared for Air India and Mr. Naranarayan Gupta, the learned Advocate General appeared for Ratan Tata. The only object of the appearance of the learned Counsel for Air India and Ratan Tata was to resist from any order being passed for production of any document including the letter dated 30th April, 1987. The whole matter cannot be adjudicated without the said letter and the authenticity of the contents of the said letter and it is submitted by Mr. Chatterji that the same cannot be the subject-matter of arbitration and is outside the scope of the agreement. The learned counsel appearing for the respondent also referred to page 21 of the Affidavit-in-opposition i.e. letter dated 22nd July, 1986 wherein the respondent No. 1 is described as the consultant of Boeing Company in India with respect to sale of BCAC Air Craft. That the letter of consignment was issued in January, 1987 and the said fact will appear from the letter dated 11th January, 1987 appearing at page 27 of the Affidavit-in-opposition. The resistence on payment is made by Boeing on the ground that there was a Government policy and/or policy of the Air India which prohibited payment of any consultancy charges to the respondent No. 1 as to whether there was any such policy to that effect was actually in existence so far as Union of India and/or Air India is concerned, the same cannot be the subject-matter of arbitration and is beyond the scope of arbitration. The learned Counsel appearing for the respondent also referred to paragraph 11 of the plaint which is set out hereinbelow:

"11. Further and/or in the alternative, the plaintiff provided substantiall consultancy service to the defendant at its request not intending to do so gratuituously both during the currency of the said agreement till 30th April, 1987 and thereafter. The defendant has received substantial benefits from the said consultancy service provided by the plaintiff for which the defendant is liable to compensate and remunerate the plaintiff. The plaintiff reasonably assesses such compensation and remuneration at US 17.5 million aquivalent to Rupee 10,07,12,500."

The adjudication of the said dispute as stated in the plaint cannot be the subject-matter of arbitration and is outside the scope of the arbitration clause. Furthermore, statements are made in para 4(x) and (xi) of the affidavit-in-opposition stating that the respondent No. 1 arranged several meetings in India between 1st May, 1987 to 25th June, 1987 and as such the contract did not expire with the expiry of 30th April, 1987 and the steps taken by the respondent No. 1 as consultant of the petitioner at the instance of the petitioner are stated in those paragraphs and those fact show that various services were rendered even after the expiry of 30th April, 1987 and in the affidavit-in-reply there is no specific denial about the said statement. Therefore, the said facts goes uncontroverted. Therefore, the services which were rendered even after the expiry of the alleged written contract and the consultancy charges payable therefor cannot be a subject-matter of arbitration. The learned counsel of the respondent relied on a decision reported in AIR 1949, Cal 179, (Johurmull Parasram v. Louis Dreyfus Co. Ltd.) and submitted that it has been held that the claim based on tort and an implied contract cannot be a subject-matter of arbitration. It is submitted by Mr. Mitter, learned Advocate appearing for the respondent that while deciding the application under Section 3 of the sid Act, the Court will consider not only the plaint but all documents and facts which will be placed before the Court. If the statements made in the affidavit-in-opposition are not considered by the Court as submitted by the learned Advocate for the petitioner, then there was no necessity for the Court for giving direction for filing Affidavit-in-opposition and thereafter to file a reply and thereafter to fix the matter for [illegible]

submitted by Mr. Mitter that while disposing of the application the Court must look into and consider all facts and circumstances and then will come to a finding. The learned Advocate for the respondent relied on a decision reported in AIR 1978, Cal 19, (Alliance Jute Mills Co. v. Lalchand Dharamchand) wherein it has been held that the Court is empowered to look into the plaint and petition, affidavits, papers and documents connected with the application in order to find out whether the subject-matter of the suit is within the scope of the Arbitration Act. The Court is empowered to look into the pleading to find out if the original agreement containing the arbitration clause has been superseded by the subsequent agreement as pleaded.

16. It is submitted by Mr. Aninda Mitra, learned Advocate appearing on behalf of R. M. I., respondent, that the respondent under the agreement was to provide cultural and commercial as also managerial assistance and information which may be helpful to Boeing's customers and for rendering assistance as Boeing made reasonably require in concluding the contract with the customers of Aircrafts. The compensation payable to the respondent under the said agreement, was two fold, firstly annual retainership payable in quarterly instalments and secondly on sale of aircrafts with the entire transaction between Boeing and Air India was matured because of the consultancy services rendered by the respondent, R.M.I., and ultimately a formal agreement was executed on 7th August, 1987. Boeing in respect of getting benefit of the consultancy services rendered by the respondent in terms of the said agreement failed and neglected to make payment to R. M. I. in terms of the agreement and R. M. I. was compelled to institute a suit being No. 363 of 1990 in this Hon'ble Court. At that point of time i.e. when the suit was filed, R. M. I. was not aware of the existence of the alleged letter dated 30th April, 1987 nor R. M. I. was aware of the collusion and conspiracy between the Boeing and Air India in defrauding the R. M. I.

17. It is further submitted by Mr. Mitra that the disputes which are to be adjudicated i.e. the dispute which has arisen between the parties are not covered by the Arbitration Agreement. The main dispute which is to be decided between the parties is as to whether the letter dated 30th April, 1987 purported to be signed by Mr. Ratan Tata is false and has been fraudulently brought into existence in collusion between the Boeing and the Air India. The other dispute is whether the transaction between Boeing and Air India was delayed from 30th April, 1987 and the said delay was made in conspiracy between Boeing and Air India for the purpose of depriving R. M. I. to get compensation under the Contract. The further dispute which is to be decided as to whether the R. M. I. has rendered consultancy services even after 30th April, 1987 and because of the said services rendered by R. M. I., Boeing has received the benefit of the contract between Boeing and Air India that is though the period expired but at the instance of Boeing and Air India, R.M.I. was rendering consultancy services for which the benefit has been derived by the said parties.

18. It is submitted by Mr. Mitra that the case of fraud and conspiracy has been made by the R. M. I. in the Affidavit-in-opposition (paragraph 4 to 12), the said averments have not been denied by Boeing. The Boeing has deprived R.M.I. from getting their remuneration for the services rendered by setting up a letter dated 30th April, 1987 signed by Mr. Ratan Tata to the Boeing. The said letter on the face of which suggests that the same was procured and cannot be genuine. The said letter has no reference number. The said letter does not contain any seal of Air India, beneath the signature of Mr. Ratan Tata. The said letter does not contain any reference to any enquiry or any letter from the Boeing. The 30th April, 1987 was the last date of validity of the agreement between R. M. I. and Boeing, no explanation has been given, nor any facts has been suggested as to what impelled Mr. Ratan Tata to issue the letter on 30th April, 1987 suddenly on his own. These are the facts which suggest that the letter was procured for the purpose of defrauding the R.M.I.. Mr. Ratan Tata [illegible] Executive Chairman of Air India and the letter dated

30th April, 1987 was signed by Mr. Ratan Tata in respect of this transaction and all other letters are signed by the Deputy Managing Director. Mr. Mitra referred to the letter dated 10/17 August, 1987 wherein the Air India asked Boeing to take suitable action in the matter of agency appointments for all future dealings. The said letter is annexed at page 41 of the Affidavit-in-opposition. It is submitted by Mr. Mitra had the letter dated 30th April, 1987 was really issued on the said date, then why a letter dated 10/17 August, 1987 was given by Air India?

19. R. M. I. filed an amendment application in the suit to incorporate the additional facts and also the facts and circumstances which would show the collusion and conspiracy between Air India and Boeing and have also prayed that the Air India be added as a party to the suit and the notice of amendment was given prior to the notice of the present stay application.

20. It is submitted by Mr. Mitra that the disputes between the parties should have been stated in the petition under Section 3 of the Act of 1961 and the petitioner should have set out the dispute in the stay petition, as otherwise this Court will not be in a position to ascertain as to whether the disputes are covered by the Arbitration Agreement.

It is submitted by Mr. Mitra that the judgments referred to by Mr. Roy Chowdhury, learned Advocate appearing for Boeing, are under Section 34 of the Arbitration Act. Mr. Mitra relied upon sixth preconditions of stay which is laid down by the Hon'ble Supreme Court in Renusagar's case. Therefore, it is incumbent duty of this Court to be satisfied, before granting stay, that there are disputes between parties with regard to the matters agreed to be referred. It is further submitted by Mr. Mitra that interlocutory proceeding cannot be stayed. The amendment application filed by R. M. I. should not be stayed Mr. Mitra in support of his agreement relied upon several decisions reported in AIR 1987 Bom 226 (Vashdev Bheroomal Pamnani v. M/s. M. Bipinkumar and Co.), AIR 1928 Cal 256 (Surendra Kumar Roy Chowdhury v. Sushil Kumar Roy Chowdhury), and (1948) 52 Cal WN 45 (Chhedilal Hariniwas v. Britover Limited.). Mr. Roy Chowdhury relied on a decision reported in AIR 1981 SC p. 2085 at page 2094 wherein it has been held that the party who is in breach of the arbitration agreement institutes an action before the court the burden would be on such party to prove why the stay should be refused. It is submitted by Mr. Roy Chowdhury that the R.M.I. the plaintiff is to show why the stay should be refused and in the instant case the R.M.I. has miserably failed to discharge this onus. It is submitted by Mr. Roy Chowdhury that from the averments made in the plaint and the stay petition the two disputes arise which are as follows:

(i) Is the plaintiff entitled to receive any commission/ compensation as claimed in the plaint?

(ii) Was Boeing justified in refusing to pay such commission/compensation in spite of repeated demands from R. M. I.?

20A. It is submitted by Dr. Tapash Banerjee appearing for Boeing that on practical considerations and also for considering the stay application under Section 3 it is not necessary for this Court to consider the definition of 'Foreign Award', requiring the agreement to be commercial to bring an award within the definition. It is submitted by Dr. Banerjee that at this stage of considering stay application the Court is not concerned with the future, viz., the post award stage because if the suit is stayed it is possible that the plaintiff may not refer the dispute to arbitration at all in which event there will be no award. If the plaintiff goes to arbitration in the chosen forum in Washington but does not succeed in getting an award in which case also there will be no occasion for enforcing any award and to consider whether the award is a Foreign Award or not, and if an award is passsed in favour of the claimant it is possible that the respondent may pay all the awarded amount in which event there will be no occasion for enforcing the award. it is further submitted by Dr. Banerjee that if the award is enforced in U.S.A. under the American law against the assets and properties of the defendant which are admittedly in U.S.A. the

question whether the award is a 'Foreign Award' within the meaning of the definition laid down in section 2 of the Foreign Award Act will not arise. It is submitted by Dr. Banerjee that at this stage it is absolutely academic and theoritical to enter into the question and as such this Court should not consider the provisions of Section 2 while disposing of the application under Section 3 of the Act. It is submitted by Dr. Banerjee that the Supreme Court in the judgment in Atiabari's case reported in (1961) 1 SCR 809 : (AIR 1961 SC 232) has held :

"Trade and Commerce do not mean merely traffic in goods, i.e. exchange of commodities for money or other commodities. In the complexities of modern conditions, in their wide sweep are included carriage of person and goods by road, rail, air, waterways, contracts, banking, insurance, transactions in the stock exchange and forward markers, communication of information, supply of energy, postal and telegraphic services and many more activities — too numerous to be exhaustively enumerated-which may be called commercial intercourse..... every sequence in the series of operations which constitutes trade or commerce is an act of trade or commerce and burdens or impediments imposed on any such steps are restrictions on the freedom of trade, commerce and intercourse. ..... Articles 302, 303, 304 and 305 which I will presently advert to, make it abundantly clear that the freedom contemplated was freedom of trade, commerce and intercourse in all their varied aspects inclusive of all activities which constitute commercial intercourse .....(emphasis added.)"

It is submitted by Mr. Roy Chowdhury that as per terms of the agreement the Boeing was not under any obligation to pay compensation/ commission prohibited by any policy of requirement of the Government or of the customs. The original agreement was modified and extended till 30-4-87 within which date the sale must take place so as to entitle R.M.I. to claim compensation. The admitted fact is that the purchase agreement was executed between Boeing and Air India on 7th August 1987. Therefore, R.M.I. is not entitled to any amount. It is submitted by Mr. Roy Chowdhury that the whole of the claim in the suit was being disputed by Boeing and all the disputes being referrable to arbitration the suit as a whole is liable to be stayed. It is submitted by Mry. Roy Chowdhury that this Court is to look into the plaint and the application under Section 3 and no other document and if the Court was free to look into any and every document and to consider any and every new allegation made against the defendant-applicant at this stage the plaintiff could always render the arbitration agreement nugatory by making fresh allegation or by raising new disputes unconnected with the suit as framed or the arbitration agreement. So far as the allegation of fraud, conspiracy or collusion as the plaintiff has attempted to bring in the affidavit-in-opposition so that the matter may be taken out of the purview of arbitration and the said fact should not be looked into and/or considered by this Court, it is submitted by Mr. Roy Chowdhury that for the purpose of disposal of section 3 application the Court must confine itself to the plaint and plaint only and the Court should not take into consideration all the other facts stated in the affidavit-in-opposition. The plaintiff took out an application for amendment of the plaint and the said amended plaint was filed on 13-8-92 which clearly shows the malafide intention of the plaintiff to take the dispute between the parties outside the ambit of arbitration clause. It is submitted by Mr. Roy Chowdhury that the purpose of affidavit-in-opposition is not and cannot be to enable the plaintiff to raise disputes or to make fresh allegation for which there is not the slightest basis in the plaint.

21. Mr. Naranarayan Gooptu, the learned Advocate General appeared for Air India and Mr. Pradosh Mallick appeared for Ratan Tata. Both of them are not parties to the application. R.M.I. took out a Notice of Motion for a direction upon Air India and Ratan Tata to produce certain documents and the learned Advocate General appeared for Air India and Mr. P. Mallick appeared for Ratan Tata for opposing the said Notice of Motion.

22. On or about 28th August, 1992, RMI took out an application (Notice of Motion) alleging fraud against Air India as also conspiracy and collusion against Air India and praying for, inter alia, the following:

(i) "An order directing Air India to state on affidavit the circumstances which caused issuance of the said letter dated 30th April, 1987 being Annexure 'A' hereto and give particulars with regard to Government Policy relied upon in the said letter;

(ii) Direction upon Mr. Ratan Tata the erstwhile Chairman of Air India to state on affidavit the circumstances which caused the issuance of the said letter dated 30th April, 1987 and to give particulars of the Government policy relied upon in the said letter.

(iii) An order directing the respondent to produce or caused to be produced the documents and papers referred to in paragraph 34 of the petition.

(a) original offer submitted by the respondent;

(b) Final price at which order was passed

(c) final price after escalation at the time of delivery of each aircraft;

(d) Cost sheet at the time of original offer being the basis of the offer;

(e) minutes of meeting held on 24-4-87;

(f) Notes on Discussions held by Mr. Clancy representing the respondent with the petitioner;

(g) details of meeting held by Mr. Dickenson of the respondent and Mr. Ratan Tata Chairman of Air India both in and outside India."

The said application was opposed by Air India by filing affidavit-in-opposition. It is submitted by the learned Advocate General that Air India is not a party in the proceeding or in the suit. No relief is claimed against Air India. The suit relates to a dispute between the Boeing and R.M.I. and Air India is in no way concerned. Air India has been unnecessarily sought to be dragged into a litigation in regard to a claim by the respondent against the petitioner, for which R.M.I. has filed a suit being suit No. 363 of 1990 against the Boeing. No relief is claimed therein against Air India. There is no cause of action against Air India relating to the said agreement and the application is misconceived and not maintainable. It is further submitted by the learned Advocate General that this Court has no jurisdiction to entertain the application against Air India in view of the fact that Air India is not a party to the proceeding. It is submitted by the learned Advocate General that R.M.I. has taken out an amendment application and in the said amendment application a prayer has been made for adding Air India as a party defendant and several new allegations of fraud, collusion and conspiracy have been made against Air India and the Boeing and the said allegations are based on documents for which the discovery application was moved in the present proceedings. It is also submitted by the learned Advocate General that as a matter of public policy the issues sought to be raised against Air India as indicated earlier with a view to unnecessarily dragging Air India into the disputes between the Boeing and R.M.I. should not be allowed because India's commercial credibility in the field of global trade and commerce would be seriously jeopardised and the foreign parties would be wary and reluctant to deal with India parties. This would spell disaster for a developing country like India which is trying to establish a firm foot-hold in the international market.

23. I have carefully considered the facts and circumstances of this case. The point would be decided by this Court is, as to whether the suit filed by R.M.I. should be stayed in deciding the prayer for stay. The petitioner i.e. Boeing will have to be satisfied that the subject-matter of the suit i.e. the agreement between Boeing and R.M.I. is a commercial agreement. The question of stay of suit will arise provided the agreement upon which the suit has been filed is a commercial agreement and fulfils the conditions of Section (2). So far as the contract between R.M.I. and Boeing is concerned, R.M.I. is to render the personal service to the Boeing as the representative of the Boeing and will get

remuneration as stipulated under the contract. The case of the Boeing is that Boeing is a manufacturer of Aircraft and to have office in each and every country of the world is very expensive that is why Boeing enters into the Contract with various parties and pays for their establishment charges and the said parties, render service, for and on behalf of Boeing by securing parties and also explaining as to why Boeing Aircraft should be lucrative and will also explain to the parties about the particulars of the Boeing Aircraft and will answer all requisitions so to say, acting, for and on behalf of Boeing. In the instant case R.M.I. was appointed to render services for the purposes of securing parties for Boeing Aircraft and Air India purchased Boeing Aircrafts. So the only and main question to be decided is whether the services rendered by R.M.I. for and on behalf of Boeing under the agreement is a commercial agreement. No doubt the agreement for sale and/or deed of sale is a commercial transaction but in the instant case R.M.I. did not purchase anything nor Boeing sells anything to R.M.I.. But R.M.I. rendered logistic services to Boeing only. R.M.I. had no authority to represent Boeing or make any commitment on behalf of Boeing. From the reading of the agreement it is clear that it was a personal service which was to be rendered by R.M.I.. In disposing of the application under Section 3 of the Foreign Award (Recognition & Enforcement) Act, 1961, the Court will have to be satisfied as to whether the subject-matter is a matter of commerce under the law in force in India that is to say, whether the transaction between the parties to the agreement, is a transaction of commercial nature. If it is not a commercial transaction then the provision of Section 3 will not be applicable. From the agreement it is clear that R.M.I. was to render consultancy services for and on behalf of Boeing and or rendering such services R.M.I. had to pay original fees and R.M.I. had to establish an office for providing services in relation to sale of the product of Boeing Co. and was required to render consultation with the parties including Air India by using literature, data and other informations furnished by the Boeing Co. Section 2 of the said Act contemplates a legal relationship between the parties which must be commercial in nature and applicable in Indian Law. From the facts disclosed in the proceeding it is clear that the consultancy services was rendered even after the expiry April, 1987. Under the Contract the service was to be rendered up to April, 1987 and R.M.I. was to receive remuneration fee. If the sale is concluded through the consultancy services of the R.M.I. within on or before 30th April, 1987. It appears that even in July, 1987 R.M.I. arranged a meeting at Hawai and also rendered services as Consultant at various places. So in the instant case the service was rendered within the time stipulated under the Contract and even after the expiry of the time as mentioned in the contract so to say, the consultancy service was rendered by R.M.I. even after the period under the contract. So far as the contract between Air India and Boeing is concerned i.e. a contract for sale and as such the same is a commercial contract but so far as R. M. I. and Boeing is concerned, R.M.I. has rendered personal services to the Boeing before Union of India and/or Air India and the same appears to be a service of pure personal nature and cannot be said to be a commercial contract. The Boeing's main defence is the letter dated 30th April, 1987 issued by Mr. Ratan Tata. Ratan Tata is not a party to the proceeding. Only a notice of motion was issued upon Air India and Ratan Tata for production of certain documents. However, Air India and Ratan Tata engaged their respective counsels. The object was to resist the production of ducuments, however, at the long last, the learned Advocate appearing for R.M.I. did not pursue for production of the documents in the present proceeding and argue the application under Section 3 on merit. Boeing has resisted the claim of R.M.I., mainly, on the basis of the letter issued by Mr. Ratan Tata dated 30th April, 1987 wherein it is stated that as per the policy of the Government of India and/or Air India, no commission is to be paid. The learned counsel appearing for R. M. I. has challenged the letter dated 30th April, 1987 issued by Mr. Ratan Tata and submitted that the letter was issued fraudulently and is an outcome of conspiracy

between the Air India and the Boeing. The learned Counsel also referred to the reply of the Secretary to Prime Minister of India wherein it was stated by the Secretary for and on behalf of Prime Minister of India that there is no basis and/or foundation of the policy of the Government of India and/or Air India as stated in the letter of Mr. Ratan Tata. The disputes between the parties i.e. R.M.I. and Boeing cannot be adjudicated without the original letter dated 30th April, 1987.

24. Boeing resisted payment on the ground that there is a Government policy and the policy of Air India prohibited payment of any consultancy charges to R.M.I. It is difficult to decide or adjudicate the disputes between the parties as the existence of such policy is not exactly known. The likelihood of existence of such a policy is itself in question as it is very strange that the Government of India and/or Air India would have framed policy for purchase/sale of 2 or 3 Aircrafts in question only.

25. The authenticity of the letter of Mr. Ratan Tata is itself in question as the copy of the letter which, was produced before the Court is without any reference number and without any office seal. The Court is reasonably apprehensive about the existence of such policy and particularly the letter in question. The Court is however not inclined to go into such aspects and they will have to be examined in greater detail later.

26. It is submitted by Mr. Roychowdhury that this Court should only look into the statements made in the plaint and the application under Section 3 of the Act. The Court should not consider the other facts stated in the affidavit-in-opposition. Various judgments have been cited and elaborate arguments were made by the learned counsels appearing for both the parties. After considering the various submissions made by the learned counsels this Court is of the view that when an application is filed before the Court and the Court has given direction to file an affidavit-in-opposition and an affidavit-in-reply thereto, it would be the duty of the Court to look into the pleadings. The facts and circumstances which have been brought before the Court by the respective parties in their affidavites, should be appropriately considered by the Court. Persuant to the direction of affidavit-in-opposition and reply to be filed, the Court cannot look into the statements made in the petition in isolation, without considering the affidavit-in-opposition and reply.

27. Certain new facts are sought to be introduced in the plaint filed by R.M.I. and R.M.I. also made a prayer in the amendment petition for adding Air India as a party. But the stay order has been passed by this Court before the stay application for amendment was disposed of. As a result, the amendment petition is awaiting final adjudication and as regards the Court is concerned, this Court is not inclined to anticipate as to whether an application for amendment would be allowed and/or disallowed. The recent trend of decision is however to allow the amendment, unless a serious prejudice is caused to the other side. In the instant case written statements have not been filed and it is submitted by the learned Advocate appearing for R.M.I. that the application for amendment is pending for disposal before Justice Ajit Kumar Sengupta. This Court is not inclined to consider the statements made in the amendment petition.

28. In the amendment petition fraud and collusion has sought to be added in the plaint and various facts of fraud and collusion, between Boeing and Air India has sought to be introduced. So far as this Court is concerned, this Court has not considered those facts but the Court has taken into consideration the facts which have appeared in the affidavit-in-opposition filed by R.M.I.

29. The Court has duly considered the statements made in the affidavit-in-opposition and also reply filed by Boeing thereafter and the submissions of Mr. Somnath Chatterjee and Mr. Aninda Mitra learned Counsel appearing for R. M. I. on this point is substantive.

30. It appear as that services were rendered by R. M. I. even after the stipulated period and as such services rendered after the

...d stipulated in the agreement will not be ...ject-matter of arbitration. Therefore,in ...udicating disputes between parties it will ...ve to be decided as to whether any service ... rendered after April, 1987 and whether ...ing has obtained benefit of such service ...dered by R.M.I. It will further have to be ...sidered if R. M. I. was entitled to the ...muneration for such service rendered dur... the period of contract and also beyond the ...iod under contract. The entire matter ...nnot be a subject-matter of arbitration.

31. Another principal aspect of the matter is that Boeing was to render 5% commission out of the sale procedes to R.M.I. The said 5% is a big amount as the sale comprises crores of rupees.

32. This Court is reasonably apprehensive about what payment Air India has in fact made to Boeing. Air India being a Government of India Company, the money paid for purchase of Aircrafts, are in effect public money. In disbursing payment of such money the Air India is accountable to this Court and every citizen at large. On a true interpretation of Fundamental right granted by the Constitution, disbursement of public money should be done with public knowledge. Air India should have brought specific details before this Court.

33. The learned Advocate General was asked by the Court to take instruction from his client as to whether Air India has paid the full money or has made payment after deducting the 5% payable to R.M.I. under the agreement. The stand taken by Air India was that, it was not a subject-matter which has to be considered by this Court. Further the learned Advocate General after taking instructions submitted that the full amount was paid to Boeing though the said fact need not be looked into at this stage. The fact however raises the questions as to why full payment was made while according to Air India, a policy existed which prohibited payment of 5% commission.

34. It would be reasonably expected that Air India should be paying 95% of the value of Aircrafts as the 5% commission is not payable according to the policy, mentioned in a letter dated 30th April, 1987.

35. If it is the policy of Air India or Government of India not to pay the commission and/or remuneration of 5%, the said amount is a savings of the public exchequer. Air India is a Trustee of such savings and every citizen is a beneficiary. It is clear violation of natural justice if such knowledge is denied and/or withheld from the real beneficiaries of the money.

36. It is well-settled legal position and there can be no doubt that if any policy is adopted by "the State" it must receive proper and adequate publicity through reasonable publication before it can be held to have any binding effect. What is true in the case of the State in the ordinary acceptation of that term must apply equally in relation to the extended meaning of the term "State" in Article 12 and a fortiori it must apply also in relation to Air India which is "State".

37. In the instant case, it appears that no such procedure has been followed by the Government or Air India and the so-called policy is merely a statement coming from the non-executive Chairman, Mr. Tata, on whose words Boeing have totally relied. Rather, in support of their case, R.M.I. has produced letters from Government authorities from which it is categorically seen that there was no such policy restricting payment of commission.

38. The purpose of issuing the letter dated 30th April, 1987 is not understood in the facts and circumstances of this case.

39. These are the matters which will have to be considered very seriously while adjudicating the disputes between the parties, finally. The Court will only confine itself to their relevance and identify such important element of public interest, in the litigation between the parties.

40. The said matters, however, cannot be adjudicated effectively by arbitration, owing to volume of work involved in examination of various documents and witnesses.

41. If the arbitrator adjudicates the

disputes in America the same is likely to cause greater hardship to R. M. I. The documents and witnesses which have to be examined for the purpose of effective adjudication of disputes are in India.

42. Any litigation on American soil is likely to suffocate natural course of justice for lack of evidence. The cost of such litigation and the burden thereof is also a matter of concern, specially in regard to expenditure of public money.

43. If Section 3 application is allowed the said order will practically dispose of the suit filed by R.M.I., as the suit of R.M.I. will remain stayed. The policy of Air India or Government of India in this regard and purpose thereof will have to be decided before final adjudication of disputes between the parties and the same cannot be decided by the arbitrator.

44. In response to subpoena issued on 13th August, 1992, it was reasonably expected that Air India being a Government Company, would act bonafide and it was expected to place all the facts and documents before the Court. There should not have been any secret so far as payment of public money is concerned. In the instant application, Air India resisted production of documents, though an undertaking was given before Justice Ajit Kumar Sengupta that documents will be placed before the Court as and when they will be directed to produce the same, in case of foreign arbitration.

45. No subpoena was allowed to be issued to Air India for production of documents and the arbitration proceeding to be incurred huge expenses in the nature of prohibited expenses at least for R. M. I.

46. The evidences of Mr. Ratan Tata and also the officers of the Prime Minister's office issuing the letter will not be available at USA and the arbitrator will not be able to compel attendance of such key witnesses to the proceedings.

47. The letter of Boeing dated 28th April, Mr. Ratan Tata's letter of 30th April, Boeing's letter dated 1st May, 1987 Air India's letter of August 1987 and Government of India's clarification on policy, it appears to me that the whole matter and various issues require investigation and enquiry in a proper trial. There exists sufficient smoke of doubt with regard to existence of the policy referred to in Mr. Tata's letter of 30th April, 19[illegible] Non-payment of RMI's commission by Boeing and agreeing to extend the date of execution of formal contract with Air India without the knowledge of RMI, and the payment by Air India to Boeing as discussed above are also matters of probe.

48. In view of my finding that the transaction is not a commercial transaction and the agreement is not a commercial agreement and is purely in the nature of personal services rendered by R.M.I., the provisions of Section 3 of the act is not attracted. The natural course of justice demands that claim between the parties should be adjudicated in accordance with law and the parties should get equal opportunities to contest their respective claims and counter claims, if any.

49. If the suit is stayed it will amount to denial of justice and practically amount to dismissal of the suit without giving an opportunity of hearing. Furthermore, following the earlier decisions of this Court as referred to hereinbefore the application is dismissed. The interim order of stay stands vacated.

50. Mr. Roychowdhury, learned Advocate appearing for the Boeing prayed for stay of operation of the order as it is submitted by Mr. Roychowdhury that the R.M.I. will take out several proceedings and there should be a stay of operation of the order to stop those proceedings.

51. The Ld. Advocate appearing for Air India submitted that the operation of the order should be stayed as the judgment contained several remarks about Air India.

52. Similar prayer is made on behalf of Ratan Tata. The prayer for stay is opposed by Mr. S. Sarkar, ld. Advocate appearing for R.M.I. and submitted that his client will not initiate any fresh proceeding within two weeks and as such the prayer for stay

operation of this order should be rejected.

53. Considering the submissions made by the learned Advocates appearing for the respective parties, the prayer for stay is rejected.

54. All parties are to act on a signed copy of the minutes of the operative part of the judgment on the usual undertaking.

Order accordingly.

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