Burn Standard Company Ltd.

Vs

Mc. Dermott International Inc. and another

Civil appeal No. 1423 of 1991

(A.M. Ahmadi, V. Ramaswami, Smt. M. S. Fathima Beevi JJ)

03.04.1991

JUDGEMENT

AHMADI, J.:-

1.Special leave granted.

2. The principal question which this Court is called upon to answer in this appeal by special leave is whether the arbitration clause contained in Art. XII (paragraph 12. 1) of the Technical Collaboration Agreement entered into at Dubai, United Arab Emirates, on September 25, 1984, between the appellant Burn Standard Company Ltd., a Government of India Undertaking, and the respondent McDermott International Inc., a foreign company, is rendered void by virtue of the agreement itself being void for want of general or special permission of the Reserve Bank of India (RBI) under S. 28 of the Foreign Exchange Regulation Act, 1973 (FERA). The relevant part of the said provision reads as under:

> "28(1)- Without prejudice to the provisions of S. 47 and notwithstanding anything contained in any other provision of this Act or the Companies Act, 1956, a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India, or a company (other than a banking company) which is not incorporated under any law in force in India or in which the non-resident interest is more than forty per cent, or any branch of such company, shall not, except with the general or special permission of the Reserve Bank,-
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> (a) act, or accept appointment, as agent in India or any person or company, in the trading or commercial transactions of such person or company; or
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> (b) act, or accept appointment, as technical or management adviser in India or any person or company; or
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> (c) permit any trade mark, which he or it is entitled to use, to be used by any person or company for any direct or indirect consideration.
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> (2) where any such person or company (including its branch) as is referred to in subsec. (1) acts or accepts appointment as such agent, or technical management adviser, or permits the use of any such trade mark, without the permission of the Reserve Bank, such acting, appointment or permission, as the case may be, shall be void.

The petitioner is a Government company incorporated under the Companies Act, 1956, having its registered office at IOC, Hungerford Street, Calcutta, whereas the respondent is a Corporation organised and existing under the laws of the Republic of Panama with its executive office at P.O. Box 61961, 1010 ,Common Street, New Orleans, Louisiana 70161, U.S.A., with a branch office at P.O. Box 3098, Dubai, UAE. On 25th September, 1984 the said parties entered into an agreement, styled "Technical Collaboration Agreement", for the fabrication of off-shore platform structure, including but not limited to Jackets, Piles, Decks, Modules, Platform and Pipeline components, including their sub-components, for the oil and gas industry which required the high degree of expertise and experience as well as the technical knowhow possessed by the respondent. The duration of the agreement was fixed under Art. VIII to be five years from the effective date or five years after commencement of commercial production, whichever is greater, or until otherwise terminated earlier under the agreement. The expression 'effective date' as defined in Art. 1 means the date on which notification is received by the respondent that all Governmental approvals relating to the agreement have been secured; provided that if such approvals are not secured within 180 days from the signing of the agreement, the agreement, upon notice pursuant to Art. XVII of the agreement by either party may be made ineffective whereupon the agreement shall be treated as null and void. Obviously the purpose of the agreement was to establish the basis whereupon the respondent was to provide and the appellant was to receive technology and special technical services related to the establishment and operation of Fabrication Yard for fabricating off-shore platform structures and additional special technical services for any contracts related to marine construction activities that are awarded to the appellant. Art. X of the agreement enjoins upon the appellant to apply for necessary registration and/or governmental approval of the agreement in India within 60 days after the agreement is signed by both parties and is delivered to the appellant. A duty is cast on the appellant to furnish satisfactory evidence of receipt of the required governmental approval. The next important clause in the contract which needs to be noticed at this stage at Art. XII which reads as under:

"Article XII- Arbitration

12.1 Any claim, dispute on controversy arising out of or relating to this agreement, or the breach thereof, shall be finally settled by arbitration, pursuant to and in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with said Rules. Judgment upon the award rendered by the arbitrators may be entered in any Court having jurisdiction thereof. The situs of arbitration shall be New Delhi, India or an alternate location if the parties shall mutually agree and the arbitration proceedings shall be conducted in the English language."

Under Art. XII the validity, construction and performance of the agreement was to be governed by the Indian laws.

3. The aforesaid agreement was entered into after it was approved by the Secretariat for Industrial Approvals (SIA) by their letter dated 18th June, 1984. After the execution of the agreement it was filed with the Government of India on 5th October, 1984. By the letter dated 15th December, 1984 of the Ministry of Industry, Department of Heavy Industry, New Delhi, addressed to the appellant it

was pointed out that Cls. 3.2 and 4.2 of the agreement were not consistent with the terms and conditions of collaboration approved by Secretariat letter dated 18th June, 1984, in that, Cl. 3.2 should contain a clause that any additional payment made for special Technical Services would be subject to prior approval of Government of India and in Cl. 4.2 the payment expressed in U.S. dollars 298,200 should be 298,500 and the figure of the 3rd installment should be 99,450 instead of 99,400 U.S. dollars. To carry out these changes, the parties entered into a supplementary agreement on 29th December, 1984 and filed it with the Government of India on 9th January, 1985.

4. Under Art. IV of the agreement, in consideration of the respondent having agreed to transfer technology to the appellant, the latter undertook to pay a lump sum of $ 298,200 in three installment's, the first payment of U.S. $ 99,400 within thirty (30) days of the signing of the agreement or receipt of approval from the Government of India, whichever is later; the second payment of U. S. 99,400 upon completion of items 1 to 10 of Cl. 3.4 of Art. III and the third payment of U.S. $ 99,400 upon the commencement of commercial production of the Fabrication Yard or four years after the effective date, whichever is earlier. As stated earlier the figure '298,200' was replaced by the figure '298,250' and the amount of third installment was raised from U. S $ 99,400 to U. S. $ 99,450 under the supplementary agreement dated 9th January 1985. After this supplementary agreement was filed with the Govt. of India, the latter took the collaboration agreement on record under the communication dated 15th January, 1985. A copy of the Govt. of India's letter along with a copy of the collaboration agreement was received by the R.B.I. on 21st January, 1985. In para 7 of its affidavit dated 18th September, 1990, the R.B.1. has clarified as under:

> "However, the Bank's letter of authorisation indicating the terms and conditions to be fulfilled for remittances falling due under collaboration agreement remained to be issued to the petitioner-company. Hence the Bank's approval under S. 28(1)(b) of the Act for rendering technical etc. services under the collaboration agreement also remained to be communicated to the petitioner-company. Later, when the petitioner-company applied for remittance of the first instalment under the collaboration agreement, the Bank being satisfied that the remittance was strictly in accordance with the terms and conditions approved by the Government allowed the same.
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> On 5th February, 1985, the appellant made an application to the income-tax authorities for determination of income-tax deduction for the payment of the first installment of fees. The order passed under S. 195(2) of the Income-tax Act determining the tax at 40% of the consideration proceeds on the premise that the agreement was approved by the Government of India. Soon thereafter the appellant applied on 14th February, 1985 to the United Bank of India for remitting the first installment of fees minus 40% chargeable as income-tax. The United Bank of India intimated the rate of exchange on the very next date. The Income-tax Officer issued the No-objection certificate' on 19th February, 1985 whereupon the R.B.1. issued the permit dated 6th March, 1985 for remittance of U.S. $ 59,640 ($ 99,400-40% = $ 59,640). By the appellant's letter dated 18th March, 1985 the appellant enclosed a draft for the said amount to the respondent.

5. After the payment in respect of the first installment was thus made, the respondent wrote a letter dated 16th September, 1986 invoking Cl. 8.2 of the agreement. That clause reads thus :

> "In the event of any breach of this agreement not cured within sixty (60) days after

notification thereof, in addition to all other rights and remedies which either party may have in law or equity, the party not in default may at its option terminate this agreement by written notice. Such termination shall become effective on the date set forth in such notice of termination, but in no event shall it be earlier than sixty (60) days from the mailing thereof. Any waiver of the right of termination for default shall not constitute a waiver of the right to claim damages for such default or the right to terminate, for any subsequent breach."

By the said letter the respondent laments lack of payment of installments due from the appellant and consequential breach of the terms of the contract. The respondent then puts the appellant to notice as per Cl. 8.2 reproduced above of its right to terminate the agreement if the appellant fails to cure the breach within 60 days of the receipt of the communication. The appellant by its reply dated 12th December, 1986 questioned the respondent's right to invoke Cl. 8.2 of the agreement since in its view there was no breach of agreement and called upon the respondent to discharge its obligations under Cl. 3.4 of the agreement and receive payment of the second installment thereafter. On receipt of this reply, the respondent by their Advocate's letter dated 27th September, 1988 invoked the arbitration clause extracted earlier for referring the disputes and differences to the arbitration of International Chamber of Commerce. At the same time the respondent claimed that it was entitled to recover U.S. $621,777.09 with 15% per annum interest from the appellant for services actually rendered. On the same day the respondent wrote to the International Chamber of Commerce informing it of its decision to invoke the arbitration agreement. The appellant responded by its letter dated 1lth October, 1988 stating that the collaboration agreement dated 25th Sept., 1984 was void ab initio and not binding on the parties thereto and, therefore, Cl. 12.1 of Art. XII of the agreement was non est and legally unenforceable. On the other hand the appellant blamed the respondent for breach of contract, in that, there was failure to comply with Cl. 3.4 of the agreement, and stated that no disputes or differences of the type which could be referred to arbitration had arisen between the parties. Thus by challenging the legality and validity of the agreement and branding it void into the appellant also challenged the arbitration clause as similarly void. This was followed by the appellant filing an application under S. 33 of the Arbitration Act inter alia contending (i) that the agreement in question being a contingent one which was to commence from the 'effective date' and since the necessary approvals had not been secured, the agreement had not commenced and as the arbitration clause was a part of the very same agreement it too had not commenced and hence the respondent was not entitled to invoke the said clause and (ii) since under the agreement the respondent was appointed as Technical or Management Adviser in India within the meaning of S. 28(1)(b) of FERA, in the absence of a valid permission from R. B. I., the agreement was clearly void by the thrust of S. 28(2) of the said enactment. The respondent countered these contentions (i) by pointing out that the necessary Government approvals were obtained and hence the 'effective date' was reached and (ii) under the Exchange Control Manual (1978 Edition) only the Indian company could apply to SIA for approval and once such approval was accorded as in the present case, the foreign collaborator to the contract was not expected to secure the R.B.I. permission under S. 28(1)(b) since under the manual SIA approval was to be deemed to be R.B.I.'s permission also. It was, therefore, contended that the agreement was legal

and valid and the respondent was entitled to seek its enforcement. The arbitration clause being a part of the agreement, it was imperative on the part of the respondent to follow that course in the event of a dispute or difference arising between the parties concerning any matter covered by the agreement.

6. The High Court on a proper construction of Cl. 8.1 of the agreement held that the principal duties and obligations incorporated in Cls. 1.3 and 1.4 commence after governmental approvals are obtained. The obligation to secure necessary registration and governmental approvals is cast by virtue of Cl. 10. 1 on the appellant. Obviously the said clause comes into operation immediately on the execution of the agreement since Cl. 1.2 clearly contemplates that if governmental approvals are not obtained within 180 days, the parties will be entitled to put an end to the agreement. It is thus manifest from the terms of the agreement that some of its provisions come into effect on the execution of the agreement and remain in force for 180 days till the contract is terminated by either party. But if the parties choose to continue the contract even beyond the period of 180 days not with standing the right to terminate the same, there is nothing in the agreement prohibiting the same and, therefore, on a true interpretation of the contract it must be held to be voidable at the discretion of either party. The High Court further held on a reading of Ss. 39 and 56 of the Contract Act that even if the contract is terminated or rendered void the arbitration clause therein does not perish ipso facto for even in contingent contracts there exists a distinction between principle obligation and subsidiary obligations. After referring to the case law in detail, the High Court observed:

> "In my opinion the arbitration clause in the instant case is wide enough to include "any claim, dispute or controversy arising out of or relating to this agreement" so as to mean any dispute as to the interpretation itself including the validity thereof. Therefore, if there is any dispute relating to the interpretation of Art. 8.1 of the agreement the same can also be decided by the arbitrator."
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> Pointing out that an agreement of arbitration, though a contract, is different in its nature from the main contract of which it may form a part, the High Court held that the breach of the obligation and liabilities arising under the main contract may bring about termination of the main contract but not of the arbitration agreement. Indeed, the arbitration agreement would be invoked only when disputes arise under the main contract including a repudiation of the main contract by any of the parties and in that sense the arbitration agreement is remedial while the main contract is substantive. The High Court, therefore, held that in law the jurisdiction of the arbitrator under the arbitration clause would cover the decision as to voidability of the main contract also. The High Court then concluded as under:
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> "It is apparent from the sequence of events appearing from the list of dates already noted hereinbefore that the petitioner really made an application to the secretariat for Industrial Approvals, Department of Industrial Development and a letter of approval was issued. Thereafter the agreement dated September 25, 1984 was executed. The Government pointed out certain deficiencies as a result of which the supplementary agreement dated September 28, 1984 was executed. The said documents were all filed with the Government and thereafter the Government took the agreement on record and nothing was really required to be done by the respondent. In fact the paragraph 11 at Chap. III of Guidelines for industries of the Government of India provide for such a procedure for taking the agreement on record after the approval is given for foreign collaboration."

After quoting paragraph 11 of the said guidelines the High Court referred to the appellant's application to the Income-tax Officer for payment of the first installment under Cl. 4.1 of the agreement and concluded that such an application could not have been made unless the necessary approvals were obtained. After the Income-tax Officer made the order, the R.B.1. granted permission to remit the installment money (fee) on 6th March, 1985. It was only on account of this payment that the respondent furnished the technology and provided the technical services to the appellant in pursuance of Art. 111 of the contract. The High Court dismissed the application holding that on the appellant's failure to pay the subsequent installments, a dispute had clearly arisen between the parties which had to be resolved through arbitration.

7. Mr. Soli Sorabjee, learned counsel for the appellant, placed the appellant's case thus: Under S. 73(4) of FERA, where permission of R. B. 1. is required under any provision of the said statute for doing anything thereunder, the R.B.I. has to specify the form in which the application for such permission must be made. Paragraph - 25A.2 of the Exchange Control Manual, 1978, (Manual) refers to permission to. be obtained under S. 28(1)(b) and provides that applications for such permission should be made in form FNC5. Indisputably the respondent had made no such application in the prescribed form seeking R.B.1. permission and, therefore, the question of grant of such permission by R.B.1. did not arise. The respondent having failed to secure the R.B.I. permission as required by S. 28(1) rendered the agreement void by the thrust of S. 28(2). Besides breach of S. 28(1) is made punishable under S. 50 of FERA. That being so, the agreement is void and as the arbitration clause is a part of the said agreement, it too must fall along with the agreement. The SIA approval is not synonymous with grant of permission under S. 28(1) since the two operate in different fields and it is, therefore, erroneous to think that such approval satisfies the requirement of S. 28(1). Para 24A. 11 of the Manual is not referable to permission under S. 28(1) and must be read harmoniously with the statutory provisions, for if it runs counter to the said provisions, it would have to be ignored for the obvious reason that it cannot override the requirement of law being merely in the nature of administrative instructions. Nor can the letter of 15th January, 1985 be read to convey the grant of permission under S. 28(1). So also the permit issued by the R.B.1. dated 6th March, 1985 for remittance of the first installment payable under Cl. 4.1 of the agreement is referable to the exemption contemplated by S. 9 and has no relevance whatsoever to the permission envisaged by S. 28(1) of FERA. Thus the permission contemplated under S. 28(1) is an express permission and it would be an entire wasteful exercise to find out from the correspondence and documents placed on record if a permission can be culled out or be deemed to have been granted. In the absence of a permission, S. 28(2) declares the agreement or contract to be void and, therefore, the said agreement or any part thereof cannot be enforced in a Court of law. In High Court was, therefore, clearly wrong in the view it took in upholding the respondent's effort to invoke the arbitration clause.

8. Mr. D. P. Gupta, learned counsel for the respondent countered: The R.B.I. has published the, manual to detail the procedure for entering into such Technical Collaboration Agreements: paragraph 24A.11 lays down the procedure for securing the R.B.I. permission contemplated by S. 28(1) and where the situation does not stand covered thereunder the application has to be made under paragraph 25A.2 of the said manual which lays down a different procedure and prescribes the FNC5 form. In other words, if the case is governed under paragraph 24A. 11 then it is unnecessary to resort to paragraph 25A.2 which prescribes the FNC5 form. The Government policy for dealing with such foreign collaboration agreements is generally set out in the industrial policy document entitled 'Guidelines for Industries', Chap. IV whereof sets out a procedure identical to the one contained in the manual. The appellant had made an application under paragraph 24A. 11 to SIA for

approval of the technical collaboration arrangement with the respondent which was granted on 18th June, 1984 subject to certain terms and conditions. Certain discrepancies were pointed out by the Government of India and on the appellant having drawn the respondent's attention thereto by the letter of 21 st September, 1984, a supplementary agreement was immediately executed and filed with the Government of India on 9th January, 1985. It was thereafter that the Government of India informed the appellant that the agreement was 'taken on record', an expression which has special significance as explained in paragraph 9 of Part 1 of Guidelines for Industries. Copies of the letter of 15th January, 1985 were forwarded to R.B.I. authorities as well. It was only thereafter that the appellant applied for determination of the Income-tax amount under S. 195(2) of Income-tax Act which determination was made by an order dated llth February, 1985. The appellant then applied for permission to remit the first installment of fees and on receipt thereof enclosed a draft for U.S. $ 59,640 (after deducting 40% income-tax) under letter dated 18th March, 1985 addressed to the respondent. It was only when the subsequent payment was not forthcoming that the respondent gave notice under Cl. 8.2 of the agreement and thereafter sought to resort to arbitration. Thus the requirements of S. 28(1) were fully complied with.

9. Mr. Salve, the learned counsel for the R.B.I., placed on record an additional affidavit dated 24th January, 1991 sworn by Shivaji D. Kadam, Deputy Controller, Exchange Control Department of the R.B.I. explaining what steps the bank had taken after it received the Government of India's letter of approval together with a copy of the collaboration agreement dated 21st January, 1985. Since the said letter was only a covering letter taking on record the said agreement, the bank had by its letter dated 7th February, 1985 sought copies of the earlier letters from the Government as they were of vital importance because without those letters it was not possible for the R.B.I. to proceed under paragraph 24A. 11 of the manual. Thereafter on 14th February, 1985 the appellant reminded the R.B.I. to forward its approval to enable payment of the fees to the respondent. Again on 20th February, 1985 the appellant approached the R. B. I. for sanction to remit the fees and enclosed therewith the Government of India letters dated 18th June, 1984 and 4th August, 1984 along with an application in A-2 form. The Government of India also forwarded copies of the said two letters by a covering letter dated 1st March, 1985 which was delivered to the R.B.I. on 4th March, 1985. On the same day a note was put up to the Staff Officer, Grade A, who observed:

> In view of the Government letter having now been received, we may allow the remittance of U.S. $ 59,640 being the 1st installment of technical know how fees."
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> The Exchange Control Officer then said:
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> "We may allow the remittance of U.S. $59,640 being 1st installment of know how fees.
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> This final note of the Exchange Control Officer was countersigned by the Assistant Controller on 6th March, 1985. The deponent fairly clarifies that "as per the R.B.1. practice, the permission under para 24A. 1 1, that is, grant of sanction under S. 28(1)(b) as well . as permission under S. 9 for allowing remittances are generally authorised by the Assistant Collector." It becomes clear from this statement that the permission under S. 28(1) and the exemption under S. 9 are generally granted by one and the same officer.

10. In the backdrop of the said facts we may now proceed to consider the main submission placed before us by counsel for the appellant, namely, the agreement is rendered void for want of

permission under S. 28(1) of FERA. It is only if we accept the contention that in fact the R.B.I. had not granted any permission under S. 28(1) that the question of the agreement having been rendered void by the thrust of S. 28(2) would arise. And the question of survival of the Arbitration clause contained in the agreement notwithstanding the agreement having been rendered void by S. 28(2), would arise thereafter.

11. On a plain reading of S. 28(1) it is clear that it opens with the words "without prejudice to the provisions of S. 47", which in turn says that "no person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provisions of the Act or of any rule, direction or order made thereunder." Contravention of any provision of the Act (other than Ss. 13, 18(1)(a) and 19(1)(a)) or of any rules directions or order made thereunder is made penal by S. 50. Secondly, the said S. 28(1) places an embargo on a resident outside India or a person who is resident in India but is not a citizen of India or a company (other than a banking company) which is not incorporated under any law in force in India or in which the non-resident interest is more than 40% or any branch of such company to (a) act or accept appointment, as agent in India or any person or company, in the trading or commercial transactions of such person or company; or (b) act or accept appointment, as a technical or management adviser in India of any person or company except with the general or special permission of the Reserve Bank. Admittedly there existed no general permission and, therefore, special permission must be shown to prove satisfaction of the requirement of the said provision. Under sub-sec. (2) where any person mentioned in sub-sec. (1) acts or accepts appointment as such agent or technical,/ management adviser without the permission of the R.B.I., such acting or appointment shall be void. Therefore, let us first focus our attention on the question whether or not the RBI's permission was obtained in regard to the collaboration agreement in question?

12. Section 28(1) places restrictions on the appointment of certain individuals and companies as technical or management advisers in India unless the R.B.1. approves the same by a general or special permission. The section is silent on the mode and manner of securing such permission. However, sub-sec. (4) of S. 73 provides that where any provision of the Act requires the RBI's permission for doing anything under such proviso, the RBI may specify the form in which an application for such permission shall be made. In this connection it is essential that we notice paragraphs 24A. 11 and 25A.2 at this stage. These two paragraphs read as under:

> "24A. 11. Persons, firms and companies wishing to establish new industrial units or expand/diversify existing units with foreign technical collaboration should apply on prescribed form to the Secretariat for Industrial Approvals (SIA), Department of Industrial Development, Government of India, New Delhi, for approval. In cases where proposal for collaboration is approved by Government, Government will issue its letter of approval to the applicant indicating the terms. The applicant may thereafter execute the collaboration agreement with the collaborators strictly in accordance with the approval terms and furnish requisite number of copies of the agreement to Government. Government will take the agreement on record if it is in conformity with the approved terms and advise the applicant accordingly under intimation to Reserve Bank. Reserve Bank will thereafter issue its formal authorisation under Foreign Exchange Regulation Act, 1973, to the applicant. Although the rendering of technical advisory services by foreign collaborators under foreign collaboration agreements approved by Government attracts S.28(1) (b) of Foreign Exchange Regulation Act, 1973, it will not be necessary for the foreign collaborators to seek Reserve Bank permission under the section separately.

Accordingly, while granting approval for foreign collaboration, Reserve Bank will confirm that the approval will also be deemed to be the Bank's permission to the foreign collaborators under this section for rendering technical services to the Indian company concerned under the collaboration agreement. Permission given under this section is, however, without prejudice to the decision that the Bank may take on the foreign company's application, if any, under S. 28(1)(c) of the Act for use by the Indian company of foreign trade mark(s) involving direct or indirect consideration."

"25A.2 Under S. 28(1)(b) of Foreign Exchange Regulation Act, 1973, it is obligatory for foreign companies to obtain permission of Reserve Bank for acting or accepting appointment, as technical or management adviser in India of any person or company. Reserve Bank's permission is also necessary under S. 28(3) of the Act in cases where appointments as technical/management advisers were held by such foreign companies since prior to the coming into force of the Act i.e. Ist January, 1974 and are continuing thereafter. Applications for permission in either case should be submitted to Reserve Bank in form FNC5. These provisions are also applicable to foreign collaborators rendering technical advise to Indian firms and companies under collaboration agreements approved by Government of India. While, however, communicating approval for new collaboration agreements between Indian companies and overseas collaborators, Reserve Bank will specifically indicate that the approval also permits the foreign collaborator to render technical advise to the Indian company and separate approval need not be sought by the former from Reserve Bank under S. 28(1)(b) of the Act."

The appellant's contention that the application for permission under S. 28(1) ought to nave been made in the prescribed form FNC5 and since admittedly no such application was made by either party there was no valid permission approving the contract and hence by virtue of S. 28(2) the contract was rendered void. On a plain reading of paragraph 24A. 11 it becomes clear that the intention is to introduce the single counter or window procedure to avoid duplication and hardship to the foreign collaborators. Once the collaboration is approved by SIA, as in the present case, and the agreement is 'taken on record' there is no need to obtain a separate permission from the R.B.I Paragraph 9 of the Guidelines for Industries explains what is meant by the expression 'Taking of Agreements on Record' and its import thus:

"The approvals given for foreign collaboration are valid for a period of six months from the date of issue. In case the terms of collaboration approved by Government are acceptable to the Indian party, an intimation in this regard has to be sent by him to the concerned administrative Ministry. The Indian party can then execute the collaboration agreement with the collaborator which should be strictly in accordance with the terms approved by the Government. Ten copies of the collaboration agreement so executed, all of which should be signed by both the collaborating parties are to be furnished to the administrative Ministry. The collaboration agreement is scrutinized by the administrative Ministry and is found to be in accordance with the terms specifically approved by Government is taken on record and an intimation is sent to the party. A copy of the agreement is then transmitted to the Reserve Bank of India through the Ministry of Finance (Department of Economic Affairs) on the basis of which remittances to the foreign collaborator are authorised by the Reserve Bank of India. Representations against the terms and conditions of

collaboration approved by the Government are sent by the SIA to the administrative Ministry/ Department concerned with the item of manufacture who will continue to deal with such representations and take appropriate action. "

It will be seen from the above that after the agreement is taken on record a copy thereof has to be sent to the R.B.I. to enable it to authorise remittances to the foreign collaborator. In the present case the appellant has sought the SIA approval which was granted on 18th June, 1984 subject to the terms and conditions set out in the letter of approval. It was only thereafter that the agreement was executed on 25th September, 1984. The appellant then sent a copy of the agreement to the Government of India by the letter of 5th October, 1984 which was duly examined in the light of the terms and conditions on which the approval was granted under the letter of 18th June, 1984 and certain discrepancies were communicated to the appellant by the Ministry of Industry, Department of Heavy Industry, which necessitated the execution of the supplementary agreement of 29th December, 1984. It was only thereafter that the said department by the letter of 15th January, 1985 informed the appellant that the collaboration agreement and the supplementary agreement 'have been taken on record'. This was then forwarded to the R.B.I. which the bank received on 21st January, 1985. We have already indicated earlier how the matter was processed by the R.B.I. before the remittance of the first installment of the fees of U.S. $ 59,640 could take place after the income-tax was duly recovered at source. Paragraph 7 of the RBI's affidavit dated 18th September, 1990 extracted earlier and the details of the action taken by the R.B.I. as disclosed in the further affidavit on 24th January, 1991 leave no doubt that the remittance was permitted only after the R.B.I. was satisfied that all the terms and conditions were duly satisfied. To place the matter beyond the pale of doubt, the further affidavit filed on behalf of the R.B.I. carries the following statement:

"As per the practice of the RBI, the permission under para 24A. 11, that is, grant of sanction under S. 28(1)(b) as well as permission under S. 9 for allowing remittances are generally authorised by the Assistant Controller."

This statement places the question regarding the grant of permission under S. 28(1) beyond doubt. The affidavits filed on behalf of the R.B.I. show that the RBI's approval 'remained to be communicated' to the appellant-company. Failure to discharge the ministerial duty cannot obliterate the conscious decision taken by the R.B.I. after application of mind.

13. But counsel for the appellant stressed that the facts placed on record clearly reveal that no application for permission under S. 28(1) was made in the prescribed FNC5 as contemplated by paragraph 25A.2 of the manual. It is indeed true that the record does not disclose making of an application in the said prescribed form by either party to the agreement. Counsel, therefore, submitted that once it is found that no application for permission was ever made in the prescribed form, the provisions of sub-secs. (2) and (3) ofS.47 of FERA cannot save the agreement declared void by the statute itself. He further submitted that the case was governed by paragraph 25A.2 and not by 24A.11 and hence making of an application in the. prescribed FNC5 form was imperative and failure to do so raised a clear inference that the RBI had not granted permission under S. 28(1) since it had never been approached for such permission. He emphasised that the prescribed form for SIA 'approval' under paragraph 24A. 11 is not the same as FNC5 and hence the administrative

direction in the said paragraph that 'it will not be necessary for the foreign collaborators to seek Reserve Bank permission under this section separately' cannot override the statutory requirement of S. 28(1). The statutory duty cast on the R.B.I. by S. 28(1) cannot be abdicated by the R.B.I. by the deeming clause contained in paragraph 24A. 11 (i) extracted earlier. To buttress the submission counsel invited our attention to two cases, viz., (i) M/s. Dhanrajmal Gobindram v. M/s. Shamji Kalidas & Co. (1961) 3 SCR 1020: (AIR 1961 SC 1285) and (ii) LIC of India v. Escorts Ltd. (1986) 1 SCC 264 at p. 318 (Para 69) : (AIR 1986 SC 1370 at p. 1406, Para 69) wherein this Court held that paragraph 24A. 1 was merely an explanatory statement of guideline for the benefit of the authorised dealers and was neither a statutory direction nor a mandatory instruction. On the other hand counsel for the respondent argued that the RBI's action in regard to grant of permission under S. 28(1) being essentially administrative. See Shri Sitaram Sugar Co. Ltd. v. U. P. State Sugar Corporation Ltd., 1990 (3) SCC 223 at pp. 246-247, it is enough to show that the R.B.I. had granted the permission no matter whether it had followed the procedure of paragraph 24A. 11 (i) or 25A.2 of the manual. We think there is considerable force in this contention for the simple reason that we are concerned with the factum of permission and not the procedure followed by the R.B.I. for granting the same. The prescription of the form is merely to aid the R. B. I. to process the application for ' permission. Emphasis must be laid on substance and not on mere form. If there has been substantial compliance, as in this case, the mere lapse on the part of the R.B.I. in failing to communicate its decision should make no difference. Paragraph 25A.2 is not in derogation of paragraph 24A. 11 (i) nor does it dilute the requirement of S. 28(1). In any case the facts of the present case clearly reveal that the R.B.I. had applied its mind to the question of grant of permission and had only thereafter permitted remittance of the first instalment of the fees payable to the foreign, collaborator. Merely because application for such permission was not made in FNC5 form cannot cloud the fact that the decision to grant the permission was actually taken but the ministerial function of communicating the same remained to be done by oversight. This lapse cannot erase the decision already taken. We are, therefore, of the opinion that the R.B.I. had granted the permission contemplated by S. 28(1) and hence the agreement cannot be voided by virtue of S. 28(2) of FERA. It is not the case of RBI that it at any. time had second thoughts about its action. It never contemplated withdrawal of the permission at any point of time thereafter. Once the decision to grant the permission is taken, whether through the course charted by paragraph 24A. 11 (i) or 25A.2, that decision stands unless rescinded and the authorities are bound to act in aid there of.

14. In the view that we take it is unnecessary to examine the question whether Cl. 12.1 of the agreement would stand or perish if the agreement is rendered void under S.28(2) for failure to secu're permission under S.28(1). Since we have come to the conclusion that the RBI permission was in fact secured under S. 28(1), the second question recedes in the background. We, therefore, need not examine the same.

15. Before we part we are constrained to observe that we were pained at the attitude of the appellant-company attempting to thwart a valid agreement, part performed by the payment of the first instalment, on hypertechnical grounds, an attitude which would scare away collaborators and tarnish the image and credibility of our entrepreneurs abroad. We do hope the appellant-company will honour its obligations under the agreement and settle its differences with the respondent across the table in a business-like manner rather than litigate.

16. For the aforesaid reasons we dismiss this appeal with costs. Cost quantified at Rs. 5000/-.

Appeal dismissed.

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