PETITIONER:
R.M. INVESTMENTS & TRADING CO. PVT. LTD.

Vs.

RESPONDENT:
BOEING CO.

DATE OF JUDGMENT10/02/1994

BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
MUKHERJEE M.K. (J)

CITATION:
1994 AIR 1136 1994 SCC (4) 541
JT 1994 (1) 615 1994 SCALE (1)506

ACT:

HEADNOTE:

JUDGMENT:
The Judgment of the Court was delivered by
S.C. AGRAWAL, 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 & Trading Co. Pvt. Limited (for short "RMI"), the petitioner in these petitions, is a company incorporated under the Companies Act, 1956. Sometime in or around 1986, RMI 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 RMI agreed to provide Boeing with consultant services for promotion of sale of Boeing aircraft in India. The said agreement was initially to be operative till 31-12-1986, but by subsequent agreement it was extended till 30-4-1987. In August 1987, Definitive Purchase Agreements for purchase of two aircraft were executed between Boeing and Air India, a body corporate constituted under the Air Corporation Act, 1953. RMI claimed commission from Boeing on the said transaction but Boeing refused to pay the same and thereupon in April 1990, RMI filed a suit (Suit No. 363 of 1990) on the original side of the Calcutta High Court against Boeing for the recovery of U.S. $ 17.5 million equivalent to Rs 10,07,12,500,00 (sic) by way of compensation and remuneration on the basis of the terms of Consultant Services Agreement along with 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 RMI filed an application for injunction and an interim order was passed by a learned Single Judge of the High Court on 17-7-1992, 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 13-8-1992, 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 RMI filed an application for amendment of the plaint and for addition of Air India as a party defendant to the suit. On 14-8-1992, learned trial Judge passed an order staying the suit and all proceedings except the pending interlocutory application. On 18-81992, Boeing moved an application for vacating the interim order passed on on 17-7-1992. By order dated 5-4-1993, 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 14-10-1993. Special Leave Petition (Civil) No. 20139 of
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1993 is directed against the said judgment of the Division Bench of the High Court.

3. By order dated 30-7-1993, 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 and 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 21-12-1993. 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 RMI, 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 14-10-1993, whereby the application filed by Boeing under Section 3 of the Act has been allowed and the proceedings in the suit filed by RMI 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 construed the word "commercial" in the light of the decisions of this Court in Atiabari Tea Co. Ltd. v. State of Assam' and Fatehchand Himmatlal v. State of Maharashtra2 and the Model Law prepared by UNCITRAL and have held that "the transaction between RMI 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 Co. Ltd. v. General Electric Co.3 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 RMI 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.4 and the decision of the Bombay High

1 (1961) 1 SCR 809: AIR 1961 SC 232
2 (1977)2SCC670:(1977)2SCR828
3(1984) 4 SCC 679 : (1985) 1 SCR 432
4 (1982) 1 CLJ 511
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Court in Kamani Engineering Corpn. Ltd. v. Societe De Traction Et. D' Electricite Societies Anonyme5.

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 RMI and Boeing. In the said agreement RMI 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 aircraft and Boeing owned used aircraft (hereinafter referred to individually and collectively as "Aircraft") to customers and
> (ii)Assist 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-
5 AIR 1965 Bom 114: 66 Bom LR 7 8
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"(a) to furnish Consultant from time to time with such promotional data and other information as Boeing deems necessary for the performance of Consultant's obligations under this Agreement; and

(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 1-4-1986 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 RMI 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 aircraft in India and to assist Boeing in the sale of such aircraft. While RMI was entitled to payment of compensation for such services, the costs, expenses and charges necessary or incidental to R.M.l.'s operations were

to be borne by RMI

12.It is not disputed that the sale of aircraft by Boeing to customers in India was to be a commercial transaction. The question is whether rendering of consultancy services by RMI for promoting such commercial transaction

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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 RMI to Boeing is commercial in nature and that RMI 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.3 (SCC at p. 723-24 : SCR at p. 492) and Koch Navigation Inc. v. Hindustan Petroleum Corpn. Ltd.6 (SCC at p. 262: SCR 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 wide 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 inter-course." (emphasis Supplied)
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> (Atiabari Tea Co. Ltd. v. State of Assaml SCR 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 UNCITRAL wherein relationships of a commercial nature include commercial representation or agency" and "consulting".

15.In Micopri S.P.A. v. Sansouci Pvt. Ltd.4 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 Quits". 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. Kamani Engineering Corpn. case5 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

6 (1989) 4 SCC 259, 262 (para 8): 1989 Supp (1') SCR 70, 75

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contracts of the plaintiffs and they had kept themselves out of any commercial relations with the plaintiffs. The said decision has, therefore, no application to the facts of the present case.

17.In the present case, on the other hand, the Consultant (RMI) 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 RMI 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 RMI 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 dehors the Consultant Services Agreement and is not a claim arising under the said agreement.

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

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

21.Coming to SLP (Civil) Nos. 121-22 of 1994 which are directed against the judgment of the Division Bench of the High Court dated 21-12-1993, 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 19-4-1993, the Division Bench of the High Court, while admitting Appeal No. 295 of 1993 against the order of the learned Single Judge dated 5-4-1993 rejecting the application for stay of the suit under Section 3 of the Act, had passed an interim order in the following terms-

> " [T]here shall also be an order of stay of the suit being No. 363 of 1990 (RMI) till the hearing of the appeal."

22.In spite of the said interim order the learned Single Judge dealt with application for amendment and passed the order allowing the said application on 13-7-1993. The only contention that was urged before the Division Bench of the High Court was that the interim order dated

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19-4-1993, 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 19-4-1993, 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. SLP (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 (RMI) are dismissed.

JUDIS