Burn Standard Company Limited vs Mcdermott International Inc. And ... on 3 April, 1991

Equivalent citations: 1991 AIR 1191, 1991 SCR (2) 67, AIR 1991 SUPREME COURT 1191, 1991 (2) SCC 669, 1991 AIR SCW 1105, (1991) 2 COMLJ 142, (1991) 2 SCR 67 (SC), (1991) 2 JT 95 (SC), 1991 (1) UJ (SC) 608, 1991 (1) ARBI LR 380, 1991 (2) JT 95, 1991 CRILR(SC MAH GUJ) 318, (1991) 35 ECC 1, (1991) 5 CORLA 346, (1991) 1 ARBILR 380, (1991) 2 BANKLJ 277, (1991) BANKJ 502, (1991) 2 CIVLJ 95, (1991) 72 COMCAS 281, (1991) 2 CURCC 1, (1991) 2 BANKCLR 199

Author: A.M. Ahmadi

Bench: A.M. Ahmadi, M. Fathima Beevi

PETITIONER:
BURN STANDARD COMPANY LIMITED

Vs.

RESPONDENT:
McDERMOTT INTERNATIONAL INC. AND ANOTHER

DATE OF JUDGMENT03/04/1991

BENCH:
AHMADI, A.M. (J)
BENCH:
AHMADI, A.M. (J)
RAMASWAMI, V. (J) II
FATHIMA BEEVI, M. (J)

CITATION:
1991 AIR 1191 1991 SCR (2) 67
1991 SCC (2) 669 JT 1991 (2) 95
1991 SCALE (1)587

ACT:
Foreign Exchange Regulation Act 1973 / Foreign Exchange Manual 1978-Section 28(1) Paragraphs 24A.11(1) and 25A.2-Indian Company-Technical Collaboration agreement with foreign corporation-General or special permission of RBI-Colloboration approved by Secretariat for Industrial Approvals-Agreement taken on record by Government-Whether separtate permission of RBI necessary-Decision taken by RBI, but approval not communicated-Whether failure to discharge

ministerial duty obliterates conscious decision taken-Non-filing of FNC5 form for grant of permission-Whether erases decision already taken.

Arbitration Act, 1940; Sections 14,17,30 and 33-Foreign collaboration agreement-RBI's approval-Whether arbitration clause rendered void by virtue of agreement itself being void ab initio for want of RBI permission under Section 28(1) of Foreign Exchange Regulation Act,1973.

Administrative Law: Administrative action-Whether decision becomes binding.

HEADNOTE:

The appellant, a Government company, entered into a Technical collaboration agreement with the respondent, a foreign corporation, under which the respondent was to provide technical know-how to the appellant, and the appellant was to pay the respondent fee in foreign currency in three installments. The appellant was required to apply for registration and/or Governmental approval and furnish satisfactory evidence of receipt of such approval. The effective date of the agreement was the date on which the notification was received by the respondent that all governmental approvals in that regard had been secured. The agreement was entered into with the approval of the Secretariat for Industrial Approvals. The agreement as well as the supplementary agreement, incorporating certain changes suggested by the Government, were filed with the Government, which took the same on record, by its letter of approval, A copy of the letter of approval and also the

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collaboration agreement was sent to the RBI.

After obtaining the necessary order under Section 195(2) of the Income Tax Act from the Income Tax Officer and the permit from the RBI, the appellant remitted the first installment of fee to the respondent. Thereafter, the respondent, alleging non-payment of subsequent installments, and consequent breach of terms of contract, sought to invoke clause 8.2 of the agreement for terminating the agreement. The appellant questioned respondent's right to invoke clause 8.2. Thereafter the respondent invoked the arbitration clause, clause 12.1 of the agreement, for referring disputes and difference to the arbitration of International Chamber of Commerce and claimed certain amount for the services actually rendered and also informed the ICC accordingly. The appellant challenged the legality and validity of the agreement as void ab initio, and also clause 12.1 as non-est and legally unforceable, and filed an application under Section 33 of the Arbitration Act, contending that the agreement being a contingent one, commencing from the effective date, and necessary approval having not been secured, the agreement had not commenced and, consequently

the arbitration clause, being part of the very same agreement, the respondent was not entitled to invoke the said clause, and that in the absence of a valid permission from the RBI under Section 28(1) (b) of the Foreign Exchange Regulation Act, 1973, the agreement was clearly void by the thrust of Section 28(2) of the Act.

The respondent contended that the necessary Government approvals were obtained and hence the `effective date' was reached and that under the Exchange Control Manual only the Indian Company could apply to SIA for approval and once such approval was accorded, the foreign collaborator to the contract was not expected to secure the RBI permission under Section 28(1) (b), since under the manual, SIA approval was to be deemed to be RBI's permission also; and therefore, the agreement was legal and valid and the respondent was entitled to seek its enforcement.

The High Court held that on a true interpretation of the contract, it must be held to be voidable at the discretion of either party, that even if the contract was terminated or rendered void, the arbitration clause therein did not perish ipso facto, that the application to the Income Tax Officer for making payment of first installment could not have been made unless the necessary approvals were obtained, that the RBI had granted permission to remit the installment money (fee), after the Income Tax Officer had made the order under Section 195(2) of the

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Income Tax Act, and it was only on account of this payment, that the respondent furnished the technology and provided technical services, and that, on account of appellant's failure to pay subsequent installments, a dispute had clearly arisen which had to be resolved through arbitration.

In the appeal before this Court it was contended on behalf of the appellant company that paragraph 25A.2 of the Exchange Control Manual, 1978, provided that applications for permission under Section 28(1)(b) should be made in FNC5 and since no such application in FNC5 was made, a clear inference could be raised that the RBI had not granted permission under Section 28(1), and accordingly the agreement and the arbitration clause forming part of it were void ab initio by the thrust of Section 28(2), and that the prescribed form for SIA approval under paragraph 24A.11 was not the same as FNC5 prescribed under paragraph 25A.2 and administrative direction in paragraph 24A.11 that no separate permission under Section 28(1) was necessary could not override the statutory requirement of the Section.

It was contended on behalf of the respondent that requirements of Section 28(1) were fully complied with and the RBI's sanction, being essentially administrative, it was enough to show that the RBI had granted permission, no matter whether it had followed the procedure of paragraph 24A.11(i) or 25A.2 of the Exchange Control Manual.

Dismissing the appeal, this Court,

HELD: 1.1 Section 28(1) of the Foreign Exchange Regulation Act, 1973 places restrictions on appointment of certain individuals and companies as technical or management advisers in India unless the RBI approves the same by a general or special permission. The section is silent on the mode and manner of securing such permission. However, sub-section (4) of Section 73 provides that where any provision of the Act requires the RBI's permission for doing anything under such provision, the RBI may specify the form in which an application for such permission shall be made. On a plain reading of paragraph 24A.11 Exchange Control Manual, 1978., it becomes clear that the intention is to introduce the single counter or window procedure to avoid duplication and hardship to the foreign collaborators, and once the collaboration is approved by SIA, and the agreement is `taken on record' there is no need to obtain a separate permission from the RBI. Paragraph 9 of the Guidelines for Industries stipulates that after the agreement is taken on record, a copy thereof has to be sent to the RBI to enable it to

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authorise remittances to the foreign collaborator. [82E,84C,85A]

1.2 In the instant case, the appellant had sought the SIA approval, which was granted subject to the terms and conditions set out in the letter of approval. It was only thereafter that the agreement was executed. The appellant then sent a copy of the agreement to the Government of India which was duly examined in the light of the terms and conditions on which the approval was granted by the SIA and certain discrepancies were communicated to the appellant which necessitated the execution of supplementary agreement. It was only thereafter that the appellant was informed that the collaboration agreement and the supplementary agreement `have been taken on record. This was then forwarded to the RBI. The matter was processed by the RBI and the remittance of the first instalment of the fees took place after the income-tax was duly recovered at source. [85A-D]

1.3 The affidavits filed on behalf of the RBI leave no doubt that the remittance was permitted only after the RBI was satisfied that all the terms and conditions were duly satisfied, though 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 RBI after application of mind. [85E,G]

1.4 The RBI 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. [86H,87A]

2.1 The prescription of the form is merely to aid the RBI to process the application for permission. Emphasis must be laid on substance and not on mere form. If there has been substantial compliance mere lapse on the part of the RBI in failing to communicate its decision should make no difference. Paragraph 25A.2 is not in derogation of paragraph 24.A.11(i) nor does it dilute the requirement of Section 28(1). Factum of permission, and not the procedure followed, is relevant. [86G]

2.2 The RBI had granted the permission contemplated by Section 28(1) and hence the agreement cannot be voided by virtue of Section 28(2) of FERA. Once the decision to grant the permission is taken,

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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 thereof.[87B-C]

3. In the circumstances it is unnecessary to examine the question whether clause 12.1 of the agreement would stand or perish if the agreement is rendered void under Section 28(2) for failure to secure permission under Section 28(1).[87D]

M/s. Dhanrajmal Gobindram v. M/s. Shamji Kalidas & Co., [1961] 3 SCR 1020; LIC of India v. Escorts Ltd. & Ors., [1986] 1 SCC 264 at 318 and Shri Sitaram Sugar Co. Ltd. & Anr. v. U.P. State Sugar Corporation Ltd. & Anr., [1990]3 SCC 222 at page 246-247, referred to,

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No.1423 of 1991.

From the Judgement and Order dated 6.12.1989 of Calcutta High Court in Case No.5696 of 1988.

Soli J. Sorabjee, Deepanker Ghosh, R.M. Chatterjee, A.K. Ghose, S. Mandal and Ms. Madhukhatri for the Appellant.

Dipankar Gupta, O.P. Khaitan, A.K. Bhatnagar, Ms. Kiran Choudhary and Ms. B. Gupta for the Respondents.

H.N. Salve and H.S. Parihar for the Reserve Bank of India.

The Judgement of the Court was delivered by AHMADI,J. Special leave granted.

The principal question which this Court is called upon to answer in this appeal by special leave is whether the arbitration clause contained in Article 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 ab-initio void for want of general or special permission of the Reserve Bank of India (RBI) under Section 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 Section 47 and notwithstanding any contained in any other provisions 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 percent 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. (2) Where any such person or company (including its branch) as it referred to in sub-section (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 10C, Hungerford Street, Calcutta, whereas the respondent is a Corporation organized and existing under the laws of the Republic of Panama with its executive office at P.O. Box 61961, 1010 Common Street, Near Orleans, Louisiana 701610, 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 & 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 know-how possessed by the respondent. The duration of the agreement was fixed under Article 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 Article 1 means the date of which notification is received by the repondent 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 Article 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 whereunder 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. Article 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 to receipt of the required governmental approval. The next important clause in the contract which needs to be noticed at this stage is Article XII which reads as under:

> "Article XII-Arbitration 12.1 Any claim, dispute or 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. Judgement 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 Article XII the validity, construction and performance of the agreement was to be governed by the Indian laws.

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 clauses 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, clause 3.2 should contain a clause that any additional payment made for specific Technical Services would be subject to prior approval of Government of India and in clause 4.2 the payment expressed in U.S. Dollars 298,200 should be 298,500 and the figure of the 3rd instalment 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.

Under Article 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 installments, 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 clause 3.4 of Article 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 the third instalment was raised from U.S.$99,400 to U.S.$99,450 under the supplementary agreement dated 9th January, 1985. After

this suuplementary 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 RBI on 21st January, 1985. In para 7 of its affidavit dated 18th September, 1990, the RBI has clarified as under:

> "However, the Bank's letter of authorization 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 Section 28(1) (b) of the Act for rendering technical etc. services under the collaboration agreement also re-
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> mained 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."

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 instalment of fees. The order passed under Section 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 instalment 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 RBI issued the permit dated 6th March, 1985 for remittance of U.S. $ 59,640 ($ 99,640-40%=$59,640). By the appellant's letter dated 18h March, 1985 the appellant enclosed a draft for the said amount to the respondent.

After the payment in respect of the first instalment was thus made, the respondent wrote a letter dated 16th September, 1986 invoking clause 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 clause 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 clause 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 clause 3.4 of the agreement and receipt payment of the second instalment thereafter. On receipt of this reply, the respondent by their Advocate's letter date 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 11th October, 1988 stating that the collaboration agreement dated 25th September, 1984 was void ab-initio and not binding on the parties thereto and therefore, clause 12.1 of Article 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 clause 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 ab-initio the appellant also challenged the arbitration clause as similarly void. This was followed by the appellant filing an application under Section 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 Section 28(1) (b) of FERA, in the absence of a valid permission from the RBI, the agreement was clear void by the thrust of Section 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 RBI permission under Section 28(1) (b) since under the manual SIA approval was to be deemed to the RBI'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.

The High Court on a proper construction of clause 8.1 of the agreement held that the principal duties and obligations incorporated in clauses 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 clause 10.1 on the appellant. Obviously the said clause comes into operation immediately on the execution of the agreement since clause 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 notwithstanding 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 Sections 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 Article 8.1 of the agreement the same can also be decided by the arbitrator."

> 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:

> "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 Govt. and thereafter the Government took the agreement on record and nothing was really required to be done by the repondent. In fact the paragraph 11 at Chapter 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 instalment under clause 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 RBI granted permission to remit the instalment money (fee) on 6th March, 1985. It was only on account of this payment that the repondent furnished the technology and provided the technical services to the appellant in pursuance of Article III 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.

Mr. Soli Sorabjee, learned counsel for the appellant, placed the appellant's case thus: Under Section 73(4) of FERA, where permission of RBI is required under any provision of the said statute for doing anything thereunder, the RBI 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 Section 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 RBI permission and, therefore , the question of grant of such permission by the RBI did not arise. The respondent having failed to secure the RBI permission as required by Section 28(1) rendered the agreement void by the thrust of Section 28(2). Besides breach of Section 28(1) is made punishable under Section 50 of FERA. That being so, the agreement is ab-initio 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 Section 28(1) is since the two operate in different fields and it is, therefore erroneous to think that such approval satisfies the requirement of Section 28(1) . Paragraph 24A.11 of the Manual is not referable to permission under Section 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 Section 28(1). So also the permit issued by the RBI dated 6th March, 1985 for remittance of the first instalment payable under Clause 4.1 of the agreement is referable to the exemption contemplated by Section 9 and has no relevance whatsoever to the permission envisaged by Section 28(1) of FERA. Thus the permission contemplated under Section 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, Section 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. The High Court was, therefore, clearly wrong in the view it took in upholding the respondent's effort to invoke the arbitration clause.

Mr. D.P. Gupta, learned counsel for the respondent countered: The RBI 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 RBI permission contemplated by Section 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 when 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', Chapter 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 21st September, 1984 a supplementary agreement was immediately executed and filed with the Government of India on 9th January, 1985. It was thereafter the that 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 I of Guidelines for Industries. Copies of the letter of 15th January, 1985 were forwarded to RBI authorities as well. It was only thereafter that the appellant applied for determination of the Income-tax amount under Section 195(2) of Income-Tax Act which determination was made by an order dated 11th February, 1985. The appellant then applied for permission to remit the first instalment 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 clause 8.2 of the agreement and thereafter sought to resort to arbitration. Thus the requirements of Section 28(1) were fully complied with.

Mr.Salve, the learned counsel for the RBI, placed on record an additional affidavit dated 24th January, 1991 sworn by Shivaji D. Kadam, Deputy Controller, Exchange Control Department of the RBI 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 taken 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 RBI to proceed under paragraph 24A.11 of the manual. Thereafter on 14th February, 1985 the appellant reminded the RBI to forward its approval to enable payment of the fees to the respondent. Again on 20th February, 1985 1985 the appellant approached the RBI 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 RBI 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 instalment of technical know-

how fees." The Exchange Control Officer then said :

> ``We may allow the remittance of U.S.$ 59.640 being 1st instalment of know-how fees''. 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 RBI practice, the permission under para 24A.11, that is, grant of sanction under Section 28(1)(b) as well as permission under section 9 for allowing remittances are generally authorised by the Assistant Collector." It becomes clear from this statement that the permission under Section 28(1) and the exemption under Section 9 are generally granted by one and the same officer.
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> 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 ab- initio for want of permission under Section 28(1) of FERA. It is only if we accept the contention that in fact the RBI had not granted any permission under Section 28(1) that the question of the agreement having been rendered void by the thrust of Section 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 Section 28(2), would arise thereafter.

On a plain reading of Section 28(1) it is clear that it opens with the words ``without prejudice to the provisions of Section 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 Section 13, 18(1)(a) and 19(1)(a) or of any rules directions or order made thereunder, is made penal by Section 50. Secondly, the said Section 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-section (2) where any person mentioned in sub-section (1) acts or accepts appointment as such agent or technical/management adviser without the permission of the RBI, 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 ?

Section 28(1) places restrictions on the appointment of certain individuals and companies as technical or management adviser in India unless the RBI approves the same by a general or special permission. The section is silent on the mode and manner of securing such permission. However, sub- section (4) of Section 73 provides that where any provision of the Act requires the RBI's permission for doing anything under such provision, 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

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``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 case 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 approved 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 authorization 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 Section 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 section 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 Section 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 Section 28(3) of the Act in case where appointments as technical/management advisers were held by such foreign companies since prior to the coming into force of the Act i.e. 1st 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 advice to Indian firms and companies under collaboration agreements approved by Government of India. While, however, communication 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 advice to the Indian company and separate approval need not be sought by the former from Reserve Bank under Section 28(1)(b) of the Act." The appellant's contention that the application for permission under Section 28(1) ought to have 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 Section 28(2) the contract was rendered void ab-initio. 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 RBI. 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 scrutinised 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 RBI to enable it to authorise remittances to the foreign collaborator. In the present case the appellant had 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 he 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 15 January 1985 informed the appellant that the collaboration agreement and the supplementary agreement `have been taken on record'. This was then forwarded to the RBI which the bank received on 21st January, 1985. We have already indicated earlier how the matter was processed by the RBI before the remittance of the first instalment 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 RBI as disclosed in the further affidavit of 24th January, 1991 leave no doubt that the remittance was permitted only after the RBI was satisfied that all the terms and conditions were duly satisfied. To place the matter beyond the pale of doubt, the further affidavit field on behalf of the RBI carries the following statement. ``As per the practice of the RBI, the permission under para 24A.11, that is, grant of sanction under Section 28(1)(b) as well as permission under Section 9 for allowing remittances are generally authorised

by the Assistant Controller." This statement places the question regarding the grant of permission under Section 28(1) beyond doubt. The affidavits file on behalf of the RBI 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 RBI after application of mind.

But counsel for the appellant stressed that the facts placed on record clearly reveal that no application for permission under Section 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-section (2) and (3) of Section 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 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 Section 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 Section 28(1). The statutory duty cast on the RBI by Section 28(1) cannot be abdicated by the RBI 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 and (ii) LIC of India v. Escorts Ltd. & Ors. [1986] 1 SCC 264 at 318 (Para 69) wherein this Court held that paragraph 24A. I 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 Section 28(1) being essentially administrative=see Shri Sitaram Sugar Co. Ltd. & Anr. v. U.P.State Sugar Corporation Ltd. & anr. [1990] 3 SCC 223 at page 246-247 it is enough to show that the RBI 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 RBI for granting the same. The prescription of the form is merely to aid the RBI to process the application for permission. Emphasis must be laid on substances and not on mere form. If there has been substantial compliance, as in this case, the mere lapse on the part of the RBI 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 th requirement of Section 28(1). In any case the facts of the present case clearly reveal that the RBI 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 RBI had granted the permission contemplated by Section 28(1) and hence the agreement cannot be voided by virtue of Section 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 for 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 thereof.

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

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.

For the aforesaid reasons we dismiss this appeal with cost. Cost quantified at Rs.5000.

N.P.V. Appeal dismissed