

Supreme Court of India

Collector Of ... vs M/S. Essar Gujarat Ltd., Surat on 19 November, 1996

Author: Sen

Bench: B.P. Jeevan Reddy, Suhas C. Sen, K.S. Paripooran

PETITIONER:

COLLECTOR OF CUSTOMS(PREVENTIVE) , AHMEDABAD

Vs.

RESPONDENT:

M/S. ESSAR GUJARAT LTD. , SURAT.

DATE OF JUDGMENT: 19/11/1996

BENCH:

B.P. JEEVAN REDDY, SUHAS C. SEN, K.S. PARIPOORAN

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T SEN,J.

The first dispute in this case relates to the question whether the licence fees paid to M/s. Midrex International B.V., Zurich, (Midrex) should be added to the invoice value of the plant bought by M/s. Essar Gujarat Limited (EGL). The plant was originally installed at Emden Germany, in 1981 by a firm which went into liquidation. NORD/LB, a Bank, was appointed receiver of the plant. The bank floated a global tender for the sale of the plant on "as is where is" basis, EGL made an offer of DM 26 million for the plant, but could not obtain clearance of Government of India for payment within the stipulated period. The deal, therefore, fell through, The Bank sold the plant to M/s. Teviot Investments Limited (TIL) On 24th March, 1987, EGL entered into a contract with TIL for purchase of the Direct Reduction Iron Plant on certain terms and conditions. The entire agreement was subject to two conditions - (1) approval of Government of India within 30th April, 1987 and (2) obtaining transfer of the operation licence from m/s.Midrex of Charlotte, USA. The contention before this Court, on behalf of the appellant, Collector of Customs, has been that these clearly were the conditions which had to be fulfilled before the sale could take place. As a matter of fact, EGL obtained transfer of the operation licence from Midrex before proceeding with the dismantling of the plant and exporting the plant in semi-knocked-down condition to India. On the other hand, it has been contended on behalf of EGL that the overriding stipulation of obtaining transfer of the

operation licence from M/s.Midrex only kept an exit door open for EGL to back out of the contract. If for any reason, Government of India did not grant permission to go through the deal or the requisite licence from Midrex could not be obtained, it would be permissible for EGL not to go ahead with the contract. These two stipulations were not conditions of sale of the plant but were overriding conditions attached to the contract to enable EGL to back out of the contract in certain contingencies.

Before going into the merits of the rival contentions, it will be necessary to notice the facts relating to import of the plant and also the three agreements. The agreement between EGL and TIL was entered into on 24.3.1987. The agreement with M/s.Voest Alpine AG (V.A.) and with Midrex International B.V. were both entered into on 4th December, 1987. But the plant in semi-knocked-down condition was imported only in September/October, 1988. The first bill of entry in respect of 468 packages was dated 29.9.1988 and the second bill of entry in respect of 317 packages was dated 11.10.1982. In other words, even though the agreement to purchase the plant was formally executed by and between EGL and TIL on 24.3.1987, actual importation took place nearly 1 1/2 years thereafter and only after the two agreements with V.A. and Midrex were signed on 4.4.1987. These facts go to show that it was essential for EGL to have a licence from Midrex for working of plant. Mr. Salve has argued that it may have been essential for the EGL to have this licence in order to make the plant fully and effectively operational but it was not a condition of sale of the plant. It was quite an independent contract. From a plain reading of the agreement with TIL, it appears that the overriding clause may have been inserted to protect EGL but nonetheless it was a condition of sale. If this condition was not fulfilled, the sale would have fallen through. Moreover, it appears that the plant without Midrex licence would have been of no value at all. EGL had purchased the plant on "as is where is basis. But in order to operate the plant, it was essential to have a licence from Midrex.

The agreement with V.A. starts with the recital that-

"EGL will set up at Hazira, Gujarat, a gas based Direct Reduction (DR) Plant which is to be re-engineered for a rated capacity of 8,80,000 tpy of Hot Briquetted Iron (HBI) and for this purpose decided to buy the existing gas based DR plant of NOHDDEUTSCHE FERROWERKE (MORD FERRD) located at Emden, West Germany, which had a rated capacity of 8,00,000 tpy DRI under the prevailing operating conditions at Emden based the Midrex Process and to incorporate Hot Discharge and Hot Briquetting facilities."

It was further recited in the agreement that the Collaborator (V.A.) was holding construction licence and rights to use patents form Midrex International B.V. for marketing, sale, design and construction of the Midrex plants at Hazira, India.

The agreements with V.A. and Midrex go to show that the plant located at Emden was described as a Midrex plant. Its rated capacity was calculated under the prevalling operating conditions at Emden based on the Midrex process. V.A. undertook to incorporate Hot Discharge and Hot Briquetting facility and for this purpose carried out refurbishing, replacement and modification of the plant.

This would enhance the usefulness and value of the plant. It was noted that EGL had entered into an agreement with Midrex for the processing licence which was annexed to the agreement with V.A, V.A, was holding construction licence and the right to use patents from Midrex for marketing, sale, design and construction of the Midrex plant at Hazira in India. V.A. undertook to render necessary engineering services and did whatever was needed for incorporating Hot Discharge Briquetting facility and to make use of Midrex construction and process licence for this purpose.

EGL's agreement with Midrex was annexed to the agreement with V.A. and it was time and again emphasised in the agreement that the plant was a Midrex plant and the various processes that had to be employed to make the plant operational in the manner it was intended could be done only on the basis of Midrex process, It was recited in the agreement that "the Collaborator (V.A.) is capable of providing process know-how, engineering and construction of Midrex gas based DR plants including Hot Discharge and Hot Briquetting facilities and has offered to provide the services to Essar as stated hereinafter."

In Article 3 of the agreement under the heading "Midrex Process Licence and Technical Services" it was provided that in addition to the services being provided by V.A., Midrex will provide certain technical services to V.A, or to EGL in connection with transfer of technology covered under the process licence agreement attached to in Annexure 12 of the agreement. The services included:

- (a) basic engineering package for the hot discharge and hot briquetting system;
- (b) advice to Essar on optimum utilisation of iron oxide lump ore and iron oxide pellets;
- (c) provide information and documentation to allow Essar to implement improvements in plant design and/or operating procedures which have been developed by Midrex or other Midrex Process Licensees.
- (d) provide continuing information to Essar on operating results from other Midrex Plants to assist Essar in optimizing plant operating efficiency including operating reports, operation bulletins and operation seminars.

Article 10 of the agreement is as under:

"Article 10: CONTRACT DHILL:- In consideration of fulfilment by Collaborator of its obligations under this Agreement, Essar shall pay to COLLABORATOR as below:-
SERVICES TO BE PROVIDED OUTSIDE INDIA:

10.1.1 Process DM (German Marks) license and allied technical services
10.1.1 Process license DM 2,000,000 fee payable to MIDREX Corporation for the right to use the Midrex process and patents
10.1.1.2 Cost of Technical DM 10,100,000 services provided lump sum under Article 3 in connection with Midrex process Technical Services.

10.1.2.1 Payment for DM 23,100,000 engineering and lump sum consultancy fee as specified under this agreement
10.1.2.2 Payment for DM 2,200,000 theoretical and lump Sum practical training outside India Total -----

DM 37,400,000 lump sum

The agreement signed by EGL with Midrex International B.V., recorded that the licensee, EGL, had entered into an agreement for purchase of a Midrex Direct Reduction Plant installed at Emden, West Germany and intended to have the same dismantled, refurbished, adapted for production of Midrex Hot Briquetted Iron (HBI) and re-installed in India.

The licensee had approached Midrex for an appropriate process licence for the operation of the plant utilising the Midrex Direct Reduction Process, and Midrex desired to grant such licence to licensee upon the terms and conditions stated in the agreement. It was further recorded that the licensee had entered into an agreement dated 4th December, 1987 with V.A. and it was agreed that Midrex would render various services as mentioned in the agreement, which would be annexed to the Collaboration Agreement with V.A.

It was clearly stated that the agreement with Midrex meant Process Licence Agreement including all the appendices, attachments and amendments thereto". It was further clarified that Midrex Direct Reduction Plant" shall mean any facility for reducing iron oxides into Product or direct reduced iron (DRI) which had been heretofore, was being currently, or would be in the future constructed or operated under a licence from Midrex. Midrex Direct Reduction Process" was defined to mean the process used in the plant or other Midrex Plants for the direct reduction of iron bearing oxide (including iron ore, iron oxide pellets or other iron bearing materials in any form) in a shaft furnace to produce Product or direct reduced iron (DRI) using a gaseous reductant irrespective of the reductant source; the solids flow system beginning at the iron oxide distribution system at the top of the shaft furnace and ending at the Product discharge from the HBI quench system or the DRI discharge device at the bottom of the shaft furnace and the gaseous flow system beginning at the spent gas offtake of the shaft furnace, leading through the gas processing system and ending at the reducing gas inlet of the shaft furnace.

EGL was granted a licence to use the plant on the following terms:

Grant of Licence

(a) Subject to the provisions of this Agreement, Midrex grants and agrees to grant to Licensee for the term of this Agreement:

(i) The right to use all Patents and Confidential information the operation of the Plant; and

(ii) The right to produce in the Plant and use and sell worldwide, Product produced by the Plant or DRI which may be produced by the Plant from time to time.

(b) Licensee should be free to sub- license the rights granted under the clause 2.1 of this Agreement to another Indian party should it become necessary. The terms of such sub-licensing will, however, be as mutually agreed to by all the parties concerned including Midrex and will be subject to the approval of Government of India and Midrex.

The agreements with Midrex and also V.A. bring out the real nature of the agreement with TIL, which had been made subject to obtaining a licence from Midrex. This agreement with V.A. recites that the plant, when it was bought, had a rated capacity of 8,00,000 tpy DRI under the prevailing operating conditions based on the Midrex Process. It was recited that the Collaborator (V.A.) was holding construction licence and rights to use patents from Midrex for marketing, sale, design and construction of the Midrex plants at Hazira, India. The services that were to be rendered by V.A. would also include technical services in connection with the Midrex Process and engineering services necessary for this purpose. The Collaborator agreed use construction and process licence for this project at Hazira, India. It was recorded that EGL's contract with Midrex had been annexed to the contract with the Collaborator.

Reading all these agreements together, it is not possible to uphold the contention of Mr. Salve that the pre- condition of obtaining a licence from Midrex was not a condition of sale, but a clause inserted to protect EGL. Without a licence from Midrex, the plant would be of no use to EGL. That is why this overriding clause was inserted. This overriding clause was clearly a condition of sale. It was essential for EGL to have this licence from Midrex to operate this plant and use Midrex technology for producing sponge iron in India. Therefore, in our view, obtaining licence from Midrex was a pre-condition of sale. In fact, as was recorded in the agreement, the sale of the plant had not taken place even at the time when the contract with Midrex was being signed on 4.12.87, although the agreement with TIL for purchase of the plant was executed on 24th March, 1987. Therefore, we are of the view that the Tribunal was in error in holding that the payments to be made to Midrex by way of licence fees could not be added to the price actually paid to TIL for purchase of the plant.

Rule 9 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 is to the following effect:-

"9. Cost and services.- (1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods,-

- (a)
- (b)
- (c) royalties and licence fees

related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller:

(e) all other payments actually made or to be made as a condition of sale of the imported goods. by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable."

The Tribunal has referred to the Interpretative Notes given in the Schedule by which Rule 9 has been explained in the following words: -

"Rule 9(1)(c)

1. The royalties and licence fees referred to in rule 9(1)(c) may include among other things payments in respect to patents, trademarks and copyrights. However, the charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable for the imported goods in determining the customs value.

2. Payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not condition of the sale for export to the country of importation of the imported goods."

It is difficult to see how these Interpretative Notes come to the aid of the importer in this case. Midrex has granted licence to EGL not only for the right to produce in the Midrex Direct Reduction Process Plant and sell the products produced by the plant worldwide, but has also given the licensee (EGL) the right to use all patents, confidential information for the operation of the plant. Midrex has undertaken to supply all confidential information and patents updated from time to time during the period of the agreement. Therefore, we are of the view that licence fees Paid to Midrex will have to be added to the price of the plant to arrive at the transaction value of the plant.

There is another way of looking at the problem. Section 14 of the Customs Act provides:

"14. Valuation of goods for purposes of assessment.(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value the value of such goods shall be deemed to be-

(a) the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest, in the business of each other and the price is the sole consideration for the sale or offer for sale: Provided that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under Sec.46, or

a shipping bill or bill of export; as the case may be, is presented under Sec.50;

(b) Where such price is not ascertainable, the nearest ascertainable equivalent thereof determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-section (1), if the Central Government is satisfied that it is necessary or expedient to do it may, by notification in the official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value. (3) For the purposes of this section-

(a) "rate of exchange" means the rate of exchange-

(i) determined by the Central Government, or

(ii) ascertained in such manner as the Central Government may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and Indian currency" have the meanings respectively assigned to them in the Foreign Exchange Regulation Act, 1973 (46 of 1973)"

The entire purpose of Section 14 is to find out the value of the goods which are being imported. The EGL in this case was purchasing a Midrex Reduction Plant in order to produce sponge iron. In order to produce sponge iron it was essential to have technical know-how from Midrex. It was also essential to have an operating licence from them. Without these the plant would be of no value. That is why the pre-condition of a process licence of Midrex was placed in the agreement with TIL. It will not be proper to view that agreement with TIL in isolation in this case. The plant would be of no value if it could not be made functional. EGL wanted to buy the plant in working condition. This could only be achieved by paying not only the price of the plant, but also the fees for the licence and the technical know-how for making the plant operational. Therefore, the value of the plant will comprise of not only the price paid for the plant but also the price payable for the operation licence and the technical know-how. Rule 9 should be construed bearing this in mind.

Mr. Salve, appearing on behalf of the EGL has laid great stress on the various clauses of the agreement between Essar and TIL to show that the title to the plant had passed to the purchaser without any precondition after payment was made in terms of clause 2 of the agreement. The delivery was also deemed to have taken place at the time and on the date of payment in full, in accordance with clause 2.

Clause 2 merely states that the purchaser shall purchase the property from the seller at an inclusive purchase price of 26 million German Marks. 10 per cent of the purchase price had to be paid within fifteen days of the declaration of the buyer that the Government of India has given approval under

clause 11 of the agreement and the balance 20 per cent, within 60 days of the approval given by the Government of India. There is no mention of the other condition in clause 11 that the agreement would be subject to "the purchaser obtaining the transfer of the operation licence from Messrs Midrex of Charlotte, USA". It appears from the agreements with V.A. and Midrex that unless and until the requisite licence and know-how was obtained from Midrex and also V.A., it would be impossible to shift the plant from Emden, West Germany and install it at Hazira, India and produce sponge iron from that plant. It appears that if Midrex did not grant operation licence for running the plant, the usefulness and value of the plant will considerably diminish if not evaporate altogether.

There are also several curious aspects of the three agreements. The agreement with TIL starts with a recital that "the Purchaser and Seller have today respectively purchased and sold a Direct Reduction Iron Plant on the following terms and conditions". This indicates that the purchase and sale of the plant had place on 24.3.1987 but in clause 2 it is stated that the Purchaser shall purchase the Property from the Seller" at the stated price. Thereafter, it is stated that the price shall become due and payable only after the buyer declaring that the Government of India has given approval as per clause 11 of the agreement. The delivery was also postponed till full payment was made in accordance with clause 2. The risk of accidental destruction, loss or damage to the property "shall devolve upon the Purchaser with the expiry of the day following that upon which the plant is delivered...". Clause 5 makes it clear that title to the property shall devolve upon the purchaser after complete, unconditional and irrevocable payment of the purchase price.

All these clauses go to show that though the agreement starts with the recital the "the Purchaser and the Seller have today respectively purchased and sold a Direct Reduction Iron Plane, on the following terms and conditions", but as a matter of fact no sale had taken place on that date, i.e. 24.3.87. The delivery was postponed till full payment was made. The question of payment did not arise till Government of India gave its approval to the agreement. Title to the property would devolve upon the purchaser only after complete, unconditional and irrevocable payment of the purchase price. The risk of destruction, loss or damage to the plant remain with the Seller till after the date of delivery of the plant. Therefore title to the plant was not to pass to the purchaser unless and until full payment was made. The entire contract was subject to the condition of the purchaser obtaining the necessary licence from Midrex to operate the plant. This clause may have been inserted to protect the interest of the purchaser but it was pre-condition of sale of the plant.

Although the agreement with TIL does not describe the plant as Midrex Direct Reduction Plant, the agreement with Midrex leaves no room for doubt that what the assessee had purchased was a Midrex Direct Reduction Plant at Emden. Although the plant was described in the agreement with TIL merely as a Direct Reduction Plant and the name of Midrex was carefully kept out, the agreement with Midrex makes it abundantly clear the assessee had entered into an agreement to purchase Midrex plant for which it was essential to have operational and Midrex technology to make the plant functional. That is why the overriding clause of having prior licence of Midrex was inserted in the purchase agreement with TIL. Without this licence and various other technical information to be provided by Midrex, it might not have been possible to operate the plant at all. It was only after this agreement with Midrex that the purchase of the plant was completed. Bearing in mind the terms and conditions of all the three agreements, we are of the view that it was essential for EGL to have

the Midrex licence to operate the plant and the pre-condition imposed in clause 11 of the purchase agreement about the operation licence from Midrex was to ensure that EGL got a plant which could be made operational with Midrex technology.

Therefore, the process licence fees of DM 2,000,000 was rightly added to the purchase price by the Collector of Customs. The order of CEGAT on this question is set aside.

The second question relates to the cost of technical services in connection with the Midrex Process provided under Article 3 of the agreement between Essar and their Technical Collaborators M/s. Voest Alpine of Austria (V.A.). In order to appreciate the scope of the controversy, it has to be remembered that an agreement with V.A. was entered into on 4th December, 1987. On this very day, Essar entered into another agreement with Midrex. In fact, the Midrex agreement was annexed to the agreement of V.A. and was thereby made a part of the agreement with V.A. The two agreements have to be read together to find out the real intention of the parties. Essar had purchased a Midrex Reduction Plant on "as is where is" basis from TIL. It was recited in the agreement with V.A. that Essar intended to set up at Hazira, Gujarat, a gas based Direct Reduction (DR) Plant which was to be re-engineered for a rated capacity of 880,000 tpy of Hot Briquetted Iron (HBI). For this purpose Essar decided to buy the existing gas based DR Plant located at Emden, West Germany, which had a rated capacity of 800,000 tpy DRI under the prevailing operating conditions at Emden based on the Midrex Process and to incorporate Hot Discharge and Hot Briquetting facilities. V.A. had inspected the Plant at Emden and was satisfied as to the technical suitability for dismantling of the plant and its recreation at Hazira after necessary refurbishing, replacement and/or modifications. It was also recorded in the agreement that Essar had entered into an agreement with Midrex for process licence, which was annexed to the agreement and V.A. was holding construction licence and rights to use patents from Midrex for marketing, sale, design and construction of the Midrex Plants at Hazira, India.

Therefore, it appears from the two agreements that the plant was a gas based Midrex Direct Reduction Plant. Its rated capacity based on Midrex Process was 800,000 tpy. Essar had acquired the operating licence by virtue of an agreement with Midrex International, which was annexed to the agreement with V.A. V.A. had a construction licence and rights to use patents for marketing, sale, design and construction of the Midrex Plants. One of the stated objects for appointing V.A. to raise the existing rated capacity of plant of 800,000 tpy to 880,000 tpy and also to incorporate Hot Discharge and Hot Briquetting facilities. The agreement also recorded:-

"WHEREAS Essar is desirous of engaging the COLLABORATOR under this agreement for providing the services for the project, as generally detailed below, together with such modifications and additions as may be required and shall also include technical services in connection with the Midrex Process and engineering services necessary for the incorporation of Hot Discharge and Hot Briquetting facilities, Which are obviously and fairly intended and which may not have been specifically referred to but are essential for proper functioning of the plant and further shall be deemed to include and cover but not limited to the following except for services specifically excluded: OUTSIDE INDIA Use of Midrex construction and

process licence for this project at Hazira, India.

Provide basic engineering and re- engineering for re-location of the existing plant to Hazira, India and basis and detailed engineering work for hot discharge and hot briquetting facilities and also prepare necessary technical documents in Europe and handover the same to the representative of Essar in Austria.

Engineering and Consultancy services and specialist supervision by equipment suppliers and other agencies.

Provide support services during the stay of COLLABORATOR/other specialists at Emden such as accommodation logistic and transport. Any other technical assistance needed by COLLABORATOR/Equipment Suppliers at Emden.

Specialist supervision of dismantling of the plant at Emden. Provide training engineers for training of ESSAR Personnel in a similar plant/training and at equipment suppliers works. Supervision of plant scale tests and preparation of the test report."

Although Article 3 has been included in the agreement of Essar with V.A. it records that "in addition to the services to be provided by Collaborator, the following technical services will be provided by Midrex International B.V. to either Collaborator or Essar. Under Article 3, the following services were to be rendered:

"ARTICLE 3 - MIDREX PROCESS LICENSE TECHNICAL SERVICE:

In addition to the services to be provided by COLLABORATOR, the following technical services will be provided by Midrex International B.V. to either Collaborator or Essar in connection with the transfer of technology covered under the Process License Agreement attached in Annexure XII to this Agreement:-

1. Basic engineering package for the hot discharge and hot briquetting system including :-

(a) Preparation of the Cere Plant Mass Balance for Gases and Solids including preliminary water data for the Hot Briquetting System;

(b) Development of the Basic Process and Instrument Diagrams for the Hot Briquetting, Gas and Solid system.

(c) Development of the guide drawing for furnace modification required for Hot Discharge Conversion.

(d) Development of the Overall general arrangement drawing for Hot Discharge Furnace and Briquetting Facility.

(e) Development of the guide drawings for the furnace Product Discharge Chamber, Briquetter Food Legs, and bubbles.

(f) Development of the guide drawings for the Bottom seal Gas System Scrubber and Heater.

(g) Development of general arrangement drawings for the Briquetting System including

Brakers, Quench system, Hot Finers Recycle System, Dust Collection, and Vapour Removal.

(h) Preparation of duty specifications for the Briquetting System Equipment.

(i) Preparation of duty specifications for the Bottom seal Gas system compressors, Nitrogen Generator, and Bottom Seal Gas Dryer."

Therefore, the payment of DM 10,100,000 was being made for the transfer of technology under the Process Licence Agreement entered into with Midrex. The service mentioned hereinabove are to be part of Licencing. Agreement with Midrex. This agreement was a pre-requisite for finalisation of the contract with TIL to purchase the plant at Emden. The licence is not merely a permission to use the plant, but also to provide technical know-how to make the plant functional and also to improve the capacity of the plant by incorporating Hot Briquetting system. As all these services were to be rendered under the Process Licence Agreement with Midrex, the amount payable to Midrex as part of the Process Licence fee has to be included in the Value of the plant. It has also to be borne in mind that the services were being rendered in order to improved capacity of the plant by incorporating Hot Briquetting facilities.

So far as payment of DM 23,100,000 is concerned, this sum is to be paid for Technical Services". A sum of DM 2.200,000 was payable for theoretical and practical training. This sum cannot be added to the value of the plant in any way. The sum of DM 23,100,000 payable for engineering and consultancy fee as specified in the agreement includes services like basic engineering and re-engineering for relocation of the existing plant at Hazira, India and basic engineering package for Hot Discharge and Hot Briquetting System and preparation of necessary technical documents and hand over the same to the representatives of Essar in Austria. V.A. was also to provide specialist supervision of dismantling of the plant at Emden and also supervision of the plant, preparation of test report etc. Along with this, V.A. undertook to supply support services such as accommodation, logistics and transport and any other technical assistance needed by the collaborator and also training the engineers and personnel in similar plant. It also agreed to render various services in India. The technical services will cover, inter alia, -

"2.3 Technical services related to the relation of the plant from Emden to Hazira and simultaneously considering the incorporation of Hot Discharge and Hot Briquetting facilities.

2.3.1 Assisting ESSAR in the arrangement of laboratory and plant scale tests on Indian raw materials (terms and conditions for the plant scale test are to be agreed directly between ESSAR and the owner of the plant where the test is intended to be carried out; Supervision of the test and interpretation of the test results. 2.3.2. Auditing of all the documentation available at Emden to determine the nature and extent of missing documents/information (if any) as described in Annexure I. Documents/Information will mean, without exception, all the drawings, manuals, diagrams, calculations and records, etc. available at Emden. ESSAR will make available the documents to the extent available at Emden. 2.3.3 Assessment of Process Related Units and facilities (equipment, machinery, piping instrumentation, electrics and control system related wear and spare parts) as available at Emden, jointly with ESSAR AND MECO and confirm the suitability of these facilities for use as such as evidenced at Emden or alternatively establish the extent of revamping/replacement/debottlenecking between dismantling and re-installation. Details of plant and equipment audit are described in Annexure. II.

2.3.4 Engineering services for Process Related Units, For the Hazira DR Plant, the basic process design parameters and ambient conditions will be different from that originally applicable and used for the design of the modules at EMDEN. For electrical and instrumentation equipments the basic concept of the control system of the existing DR plant will be retained. The EMDEN Design Criteria and the Hazira Design Criteria are stipulated in Annexure III of this Agreement.

Collaborator will perform all process calculations on the basis of the design criteria applicable, or Hazira and perform the re-engineering work to the extent required simultaneously considering the incorporation of Hot Discharge and Hot Briquetting facilities. 2.3.4.1 Prepare complete list of all new, missing equipment, machinery, electrics instrumentation refractories, insulation, lubricants, chemicals, catalyst to be procured modified, erected and commissioned as well as list of wear and spare parts for the first two years of operation, all with engineering specifications sufficient to enable ESSAR to arrange timely procurement. COLLABORATOR will assist ESSAR in providing technical clarifications during evaluation and negotiations with vendors.

2.3.4.2 Prepare a list of items requiring reconditioning, along with relevant specifications for these items. Nature and extent of re-conditioning will also be specified by COLLABORATOR which will be further discussed and agreed with ESSAR and MECO in accordance with Art.3.3.2. 2.3.5 Establish jointly with ESSAR and MECO, a division list identifying those equipments, machinery, material and parts which can be procured in India or have to be imported. COLLABORATOR will provide a list of Vendors/manufacturers for refurbishing or procurement of all

import items and MECON will provide a list of indigenous items. 2.3.7. Preparation and issue of new and re-engineered drawings/documents/calculations/manuals for Process Related Units as necessary with sufficient details to enable ESSAR to procure equipment, prepare fabrication drawings and fabricate structures, erect, test, start up and commission the Process Related Units. The details of such drawings and documents are given in Annexure IV."

There are various other clauses relating to civil engineering technical specifications, documentation and also inspection and check sizing of motors, reduction gear and hydraulics of Service Units etc. It is difficult to hold that the entire payment of engineering consultancy fee to V.A. will have to be added to the imported plants. But the plant was sold on "as is where is basis. So whatever expenditure was needed to be incurred for dismantling the plant and making it ready for delivery has to be added to the value of the plant. The specialist supervision for dismantling of the plant and also engineering and consultancy services for this purpose will have to be added to the value of the imported plant. But this apart, other services rendered cannot be treated as adding in any way to the value of the plant. Since there is no clear indication as to how the various services have been valued separately of the amount of DM 23,100,000 should be added to the value of the plant on this account.

Therefore, we are of the view that DM 2,000,000 being the process licence fee paid to Midrex Corporation, DM 10,100,000 being the cost of technical services provided by Midrex and a sum of DM 2,310,000 being payment on account of engineering and consultancy fee payable to V.A., should be added to the value of the imported plant.

The appeals are disposed of as above. There will be no order as to costs.