

Dominant Offset Private Ltd. Vs. Adamovske Strojirny

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Court : Delhi

Decided On : Jan-19-2000

Reported in : 2000IIAD(Delhi)717; AIR2000Delhi254; 84(2000)DLT594; 2000(54)DRJ523

Judge : K. Ramamoorthy, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 34(2)

Appeal No. : F.A.O. No. 202/98

Appellant : Dominant Offset Private Ltd.

Respondent : Adamovske Strojirny

Advocate for Def. : Mr. V.N. Koura, Sr. Advocate and ; Mr. S.V. Bahadur, Adv.

Advocate for Pet/Ap. : Mr. Maninder Singh and; Ms. K. Pratibha Singh, Advs

Judgement :
ORDER

K. Ramamoorthy, J.

1. The appeal is directed against the order dated 18.4.1998 passed by the Hon'ble Arbitrator on the application filed by the appellant under Section 17 of the [Arbitration and Conciliation Act, 1996](#).

2. The appellant prayed for injunction restraining the respondents from manufacturing or selling offset printing machines, subject matter of the agreements between the parties, within the territories of India, Bhutan and Nepal, and also for an injunction restraining the first respondent from dealing with any one else, except the appellant. In deciding the application, it became necessary too decide what is the effective date of the commencement of the contract for the purpose of the enforcement of the terms of the contract. The Hon'ble Arbitrator by order dated 18.4.1998 declined to grant injunction and rejected the case of the appellant that the effective date was 8.4.1992.

3. The appellant and the first respondent had entered into two agreements, one on the 18th of July, 1986 and the other on the 25th of July, 1986. There was an Addendum on the 14th of August, 1986. Disputes arose between the parties. The appellant moved this Court and filed S. No. 1448/94. This Court took the view that as the period mentioned in the agreement had come to an end, the arbitration clause also does not survive. thereforee, the appellant cannot seek to refer the disputes for arbitration. The appellant took up the matter to the Supreme Court of India. The parties before the Supreme Court agreed for the matter being referred for arbitration.

4. On the 19th of September, 1997, the Supreme Court passed the following order :-

ORDER

S.L.P. (C) Nos. 11689-11691 11689-11691 & 11693 of 1997.

Leave granted.

In view of the developments, which have taken place during the pendency of these appeals in this Court, we are not obliged to trace the course of litigation. Learned counsel for the parties submit that the parties have entered into an agreement to refer their disputes to sole arbitration of Mr. Justice P.K. Bahri, (Retired). The terms of the agreement are as follows:

'(i) All disputes between the parties arising out of the said agreements dated 18th July 1986 and 25th July 1986 are agreed to be referred to the sole arbitration of Hon'ble Mr. Justice P.K. Bahri (Retd.) and the said disputes shall include but shall not be limited to the following :

(a) Whether any Arbitration Agreement exists between the petitioner and the respondent?

(b) Whether the said agreements are valid and subsisting.

Issues (a & b) above shall be decided by the learned Arbitrator independently of the findings of the learned Single Judge in A.A. 82/96 and I.A. No. 6901/96 in Suit No. 1448/94.

(c) Whether the petitioner is entitled to damages and account of profits from the respondents?

(ii) The Arbitrator may consider any request for interim orders in accordance with law.

(iii) Venue of the Arbitration proceedings shall be at Delhi.

(iv) All the SLPs may be disposed of on the above terms.'

In view of the agreement arrived at between the parties, Mr. Justice P.K. Bahri (Retd.) is appointed as the sole arbitrator and shall enter upon the reference, as per the terms of the agreement (supra). The learned Arbitrator shall fix his own remuneration and shall complete the arbitration proceedings, as far as possible, within eight months from the date of entering upon the reference.

Any further order or direction arising out of the arbitration proceedings or the Award shall be obtained from the High Court of Delhi by either of the parties and challenge to the Award, if any, shall also be made in that High Court only.

The appeals are disposed of in the above terms. No costs.'

5. Thereupon, the Hon'ble Arbitrator entered on reference and dealt with the application filed by the appellant under Section 17 of the [Arbitration and Conciliation Act, 1996](#). The Hon'ble Arbitrator took the view that the effective date was 22.5.1987 when the approval was granted and the agreements taken on record by the Government of India. The Hon'ble Arbitrator rejected the case of the appellant that the effective date should be taken as 8.4.1992.

6. It is this view that is challenged in the appeal.

7. The learned counsel for the appellant Mr. Maninder Singh submitted that while deciding the application for injunction the Hon'ble Arbitrator had also decided the question of effective date for the purpose of the reliefs claimed by the appellant. The learned counsel submitted that the appellant is not interested in pursuing the relief with reference to injunction. The only point to be decided is with reference to effective date.

8. The learned senior counsel for the first respondent Mr. V.N. Koura submitted in the backdrop of the case culminating the filing of the above appeal, the decision taken by the Hon'ble Arbitrator with reference to effective date, pursuant to the order passed by the Supreme Court of India is an award and the petitioner has to challenge the same under Section 34 of the [Arbitration and Conciliation Act, 1996](#).

9. It is now necessary to notice the facts :

On the 18th of July, 1986, an agreement was executed and the second agreement was executed on the 25th of July, 1986. The learned counsel for the appellant, Mr. Maninder Singh, brought to my notice the terms of agreement dated 25.7.1986. At page 123 of the paper book, the definition clause is given. The same reads as under :-

Definition:

1. 01 As used in this Agreement:

(a) 'Effective Date' means the date of the last approval required by law of the respective country of the parties for the Agreement to become valid after signing

the Agreement by the parties concerned and having been taken on record by Indian Authorities.

(b) 'Expiration Date' means the 8th anniversary of the Effective Date.

c) 'Term of this Agreement' means the period beginning with the Effective Date and expiring with the first to occur of the following; (i) the Expiration Date or (ii) the date of termination prior to Expiration Date as provided herein.

(d) 'Information' means all technical, engineering and manufacturing information, documentation and know-how utilised by LICENSOR in its commercial production of Product as on the Effective Date.

(e) 'Improvements and Supplemental Information' means all non-patentable technical, engineering and manufacturing information, which, during the period between the Effective Date and the Expiration Date LICENSOR may have utilized in its commercial production of Product.

(f) 'Exclusive Territory' means the Republic of India, Bhutan, Nepal.

'Non-exclusive Territory' means all remaining countries of the world with the exception of Brasil.'

10. With reference to the improvement in the techniques adopted by the respondents which will accrue to the benefit of the appellant, there is a provision in the agreement and the same is as under :-

'5.02 Improvements and Supplemental Information:

If any time during the term of this Agreement LICENSOR shall make an improvement or addition to their technical know-how relating to the manufacturing technique of the Product, LICENSOR will inform LICENSEE about such improvement(s) or addition(s). LICENSEE shall then be entitled to adopt such know-how in their manufacturing operations. The supply of such additional information shall be made free of charge.'

11. About the delivery of the documents, the provision in the agreement reads as under :-

'Delivery time

All construction, technological and commercial documentation will be handed over within five (5) months from the Effective Date.'

12. As I noticed above, the Addendum was on the 14th of August, 1986. The same is as under:-

'Addendum to Agreement signed between

DOMINANT OFFSET PVT. LTD., K-3, Hauz Khas, New Delhi (hereinafter referred to as 'LICENSEE'

and

ZAVODY VSEOBECNEHO STROJIFENSTVI, concern Bring (hereinafter referred to be as 'LICENSOR')

represented by

POLYTECHNA, Foreign Trade Corporation, Prabha, Czechoslovakia (hereinafter referred to as 'POLYTECHNA')

Consequent upon discussions between the 'LICENSEE' and 'LICENSOR' regarding payment, it has been decided to amend the following clauses as follows:-

(1) Clause 3.0

Payment of Rs. 5,20,000/- pertaining to supply of Designs & Drawings for the manufacture of Multi-colors, Two-colour/Perfecta Sheet fed Offset Printing Machine size 485x660 mm. will be made by the LICENSEE in lump sum after the receipt of Designs & Drawings and after checking of the same by the LICENSEE instead of paying this amount in three installments vide Clauses (A), (B) and (C) of Clause 3.

(2) The entire amount of Rs. 5,20,000/- (Rupees five lakhs and twenty thousand only) will be transferred to the LICENSOR's account by the LICENSEE after getting the necessary approval of Government of India and subsequently Reserve Bank of India to this effect.

(3) That no interest, whatsoever, will be payable on Rs. 5,20,000/- for allowing change in the mode of payment.

(4) All other terms & conditions of the Agreement remain unaltered.

(5) This amendment to the Agreement is an integral part of the original Agreement and will remain in full force till the validity of the original Agreement.

Signed this day of August 14, 1986 in 4 (Four) copies by both the parties.'

13. On the 12th of September, 1996, the appellant wrote to the Secretary of Industrial Approvals, Department of Industries Development, the following :-

'Sub: Application for import of Designs and Drawings for the manufacture of Multi-colors Two-colour/Perfect a Sheet-fed Offset Printing Machine in size 485x660mm (19'x26') and also Single-Colour Sheet fed Offset Printing Machine in size 381x520mm (15'x20.1/2') ADAST Dominant-515.

We hold a DGTD Registration No. DGTD/HQ/D/S-36/R-13859/E-16 (i)/NU/84 dated 11th October, 1984 for manufacture of Offset Printing Machine.

We submit herewith our application (with 5 spare copies) seeking Government approval for import of designs and drawings from Messrs Polytechna, 'Foreign Trade Corporation, Panska 9, 112 45 Prana-1, Czechoslovakia for the manufacture of Multi-colors, Two-Colour/Perfecta Sheet fed Offset Printing Machine in size 485x660mm (19'x26') and also Single-Color Sheet fed Offset Printing Machine in size 381x520mm (15'x20.1/2').

Multi-colors, Two-Colour/Perfecta Sheet fed Offset Printing Machine which we 'propose to take up for the manufacture is known as 'Adast Dominant-72P' and Single-Color Sheet fed Offset Printing Machine which we propose to take up for the manufacture is known as 'Adast Dominant-515. Catalogues of both the

products (with 5 spare copies) are enclosed.

A) DESCRIPTION OF THE PRODUCT:

i) ADAST Dominant-725P is a Multi-colors offset printing machine with a maximum speed of 10,000 impressions per hour. This machine makes it possible to print Two-colour in single-sided printing or after a swift adjustment is able to print both sides of the sheets in one go i.e. perfecting. Excellent register parameters of the press in 2-colour printing and in perfecting ensure high quality of Multi-colors impression on all convenient paper stocks up to 485x660 mm (19'x26') sheet size. The machine is of the most modern machine being manufactured anywhere in the world due to its productivity parameter, reasonable conception, simple servicing and reliable construction including a good design. The machine is equipped with all modern and progressive elements required for such precision offset machine. Quadruple suction cup feeder head ensure reliable feeding of sheets of maximum printing speed. Tilting inside suction cups make possible releasing of sheets. All this ensures a trouble free feeding. Both printing units are connected by means of system of 3 oscillating cylinders which make possible reversal of sheets for perfect printing. The modern five-cylinders dampening device together with rich inking unit with five vibrator cylinders and four form dampening cylinders ensure a high quality of printing, the plate cylinder is provided with quick clamping system with the possibility of diagonal turning of the form. The printing machine corresponds to international safety regulations.

ii) ADAST Dominant-515 is a Single-Color offset printing machine with a maximum speed of 10,000 impressions per hour. The distinguishing feature of ADAST Dominant-515 is the utility to maintain a high output speed in close register work with good ink coverage, the simplicity of operation and the ease of maintenance. Ease of operation and the productivity results from the ink corporation of automatic elements such as dampening, inking and paper transport units. Adast Dominant-515 can extend its versatility by addition of two optional units, numbering, perforating and imprint, unit and an attachment for printing envelopes. An automatic cut-out stops the press if a sheet over-rides the front lay and therefore tilting bar ensures that each sheet is properly guided into the front lays. The

machine incorporates stream feed bottom front lay, swinging front grippers, 18 rollers inking system and chain delivery with air-brake. The printing machine corresponds to international safety regulations.

(B) End-Use of Product:

(i) ADAST Dominant-725P Sheet fed Offset Printing will be used for the printing of books, periodicals, magazines, posters, leaflets, calendars for picture postcard and other high quality commercial works in various printing houses. This machine is the best suited for Multi-colors printing.

(ii) ADAST Dominant-515 Sheet fed Offset Printing will be used for the printing of books, periodicals, magazines, posters, leaflets, calendars for picture postcard and other high quality commercial works in various printing houses. This machine is a Single-Color machine and in a smaller size and is best suited for small and medium sized printing houses.

(C) Import of Designs & Drawings:

We have approached other possible manufacturers of printing machinery seeking to import designs and drawings for taking up its manufacture in India but no other party has come forward with a positive response. The only Czechoslovakian party has agreed to give us Designs and Drawings on the following terms and conditions:-

(i) The products to be manufactured is Multi-colors Two-Colour/Perfecta Sheet fed Offset Printing machine in size 485x660mm (19'x26') with a maximum speed of 10,000 impressions per hour and Single Colour Sheet fed Offset Printing Machine in size 381x520mm (15'x20.1/2') with a maximum speed of 10,000 impressions per hour.

(ii) The Czechoslovakian party will grant exclusive rights to us to manufacture and sell product, in India, Bhutan and Nepal and non-exclusive rights to sell anywhere in the world with a exception of Brazil where the Czechoslovakian party have their own established net work.

(iii) The Czechoslovakian party will supply complete technical know-how and documentations and will provide full technical assistance and cooperation.

(iv) We will be free to sub-license the technical know-how to another Indian party but after mutual agreement of all parties concerned including foreign party and the Indian Government.

(v) The Designs and Documents/know-how fee will constitute full compensation for use of patent rights and we will be free to manufacture the product.

D) Brief description of the technology and other related techno- economic studies.:

The Sheet fed Offset printing machine require a flawless and precise stream feeding system and this is very important when operating the machine at a high speed. The rotary arm swinging grippers are a feature which contributes greatly to the precise high quality colour register required for Multi-colors printing. These machines are very precision type of machines and technology is highly sophisticated. Details of the technology employed in manufacturing of the product will be made available to us. As regards techno-economic aspects of the project, we have satisfied ourselves that there will be sufficient market for our product in the country having regard to the fact that crores worth of such machines or similar machines are being imported every year into our country.

(E) Standard to which product conforms.

The product conforms to International standard and specification. There are no comparable Indian standard for the machine.

We know request you that our application may be considered favourably and decision communicated to us as early as possible.'

14. This was for the purpose of getting the approval from the Government of India.

15. On the 22nd of May, 1987, the Government of India granted the approval for a period of six months. The order granting the approval is as under :-

'Subject: Import of Designs & Drawings from:

M/s. Polytechna, Foreign Trade Corporation, Panska 9,

112 45 Praha-1, Czechoslovakia for the manufacture of : Multi-Colour, Two-Colour/Perfecta Sheet fed Offset Printing Machine (485x660 mm), Single-Color Sheet fed Offset Printing Machine (381x520mm).

With reference to your application on the above subject I am directed to convey the approval of the Govt. of India to the import of designs & drawings by you from M/s. Polytechna, Foreign Trade Corporation, Czechoslovakia, for the manufacture of the above Offset Printing Machine on a lumpsum payment of Rs. 6,70,000 (Rupees six lakh seventy thousand only), subject to applicable Indian taxes, if any.

This approval is valid for a period of six months from the date of issue of this letter.

Please acknowledge receipt.'

16. On the 22nd of September, 1987, the appellant wrote to the Secretary to the Government of India, Ministry of Industry (HM-II Section), to extend the period of approval up to May, 1998. The same reads as under :-

'Subject: Import of Designs & Drawings from:

M/s. Polytechna, Foreign Trade Corporation, Panska 9,

112 45 Praha-1, Czechoslovakia for the manufacture of : Multi-Colour, Two-Colour/Perfecta Sheet fed Offset Printing Machine (485x660 mm), Single-Color Sheet fed Offset Printing Machine (381x520mm).

Kindly refer to approval Letter No. FC(I)/293(87)/54(87)D dated 22nd May, 1987 issued for import of Designs & Drawings for the above. Photocopy of the approval, referred above, is sent for your ready reference.

In this connection, we would like to refer to our application vide which we had requested for import of Designs & Drawings we had indicated that we will be importing the Designs and Drawings for manufacture of (i) Multi-colors, Two-Colour/Perfecta Sheet fed Offset Printing Machine (485x660 mm) and (ii) Single-Color Sheet fed Offset Printing Machine (381x520 mm).

While issuing the approval the Government has clubbed both the printing machines and issued approval for a lump sum payment of Rs. 6,70,000 subject to Indian taxes-whereas the foreign collaborator is in a position to supply, at the moment, the Designs and Drawings for Multi-colors, Two-Colour/Perfecta Sheet fed offset Printing Machine and the Designs and Drawings for item (ii) i.e. Single-Color Sheet fed Offset Printing Machine would be available only by May, 1988. We, therefore, request you to kindly arrange to extend the validity of approval letter referred above up to May, 1988. In the meantime, we are arranging to remit, after payment of necessary taxes, Rs. 5,20,000/- being the Designs and Drawings fee for the Multi-colors, Two-Colour/Perfecta Sheet fed Offset Printing Machine etc. We shall be obliged if you kindly arrange to extend the validity of the above letter till 31st May, 1988. You may also kindly confirm that the approval letter referred above which has been issued for Rs. 6,70,000/- includes both the above machines. In other words, the approval letter may kindly be amended as under:-

i) Multi-colors, Two Colour/Perfecta Sheet fed offset Rs. 5,20,000/- Printing Machine (485x660 mm)

ii) Single-Color Sheet fed Offset Printing Machine (381x520 mm) Rs. 1,50,000/- enabling us to take permission from the Reserve Bank of India for the above 2 individual remittances.

Thanking you, we remain'

17. The reasons for the extension is also mentioned in the letter.

18. On the 12th of November, 1987, the Government of India, in reply to the letter of the appellant dated 22.9.1987, accepting for approval extending the period up to 22.5.1988, wrote to the appellant the following :-

'Subject: Import of Designs & Drawings from:

M/s. Polytechna, Foreign Trade Corporation, Panska 9,

112 45 Praha-1, Czechoslovakia for the manufacture of : Multi-Colour, Two-Colour/Perfecta Sheet fed Offset Printing Machine (485x660 mm), Single-Color

Sheet fed Offset Printing Machine (381x520mm).

I am directed to refer to your letter No. Nil dated 22.9.87 on the above subject and to say that in the circumstances explained therein, Government agree to extend the validity period of this Ministry's letter No. FC(I)/239(87)/54(87)D dated 22.5.87 for a period up to 21.5.88 to enable you to complete the formalities. It is also clarified that the payment of Rs. 6,70,000/- sanctioned vide this Ministry's letter dated 22.5.87 was meant for import of designs and drawings for the undermentioned machines and you are permitted to make the payment accordingly:-

(i) Multi-colors, Two-Colour/Perfecta Sheet fed Offset Rs.5,20,000/- Printing Machine (485x660 mm)

(ii) Single-Color Sheet fed Offset Printing Machine (381x520 mm) Rs. 1,50,000/-

Kindly acknowledge receipt of this letter.'

19. On the 6th of May, 1988, the first respondent wrote to the appellant that it would be able to deliver the entire drawing only by the end of October, 1998. The letter is as under:-

'In Re: Supply of Drawings for AD 725 and Ad 515 against Government of India's approval.

We refer to the discussions your technical personnel had with us in Czechoslovakia when we showed them the designs and drawings ready for delivery. It was also explained that some of the designs are still under preparation, as we want the latest technology to be provided, and it is likely that we should be able to deliver the entire drawings only by end of October 1988. We expect you to get necessary clearance, if any, required from Indian Government so that after delivery of the designs and drawings to your personnel, we should be able to get the remittance.

Assuring you of our best cooperation at all times.

Thanking you, we remain.'

20. The first respondent was aware of the fact that the appellant was to get drawings from the authorities concerned. On the 9th of May, 1988, the appellant wrote to the Government of India for extension of the validity period in the light of the letter written by the first respondent on the 6th of May, 1988. On the 24th of May, 1988, the Government of India extended the validity period up to 30.11.1988 as the period of validity had expired on the 21st of May, 1988 the letter reads as under:-

'Subject: Import of Designs & Drawings from:

M/s. Polytechna, Foreign Trade Corporation, Panska 9, 112 45 Prabha-1, Czechoslovakia

for the manufacture of : Multi-colors, Two-Colour/Perfecta Sheet fed Offset Printing Machine (485x660mm), Single-Color Sheet fed Offset Printing Machine (381x520mm)

I am directed to refer to your letter dated 9.5.88 on the above subject and to say that in the circumstances explained therein, Government agree to extend the validity period of this Ministry's letter No. FC(I)/239(87)/54(87)D dated 22.5.87 for a period up to 30.11.88 to enable you to complete the formalities. Please acknowledge receipt.'

21. On the 22nd of August, 1988, the first respondent sent old drawings to the appellant, as could be seen from the bill of entry which is furnished at page 207 of the paper book. On the 6th of October, 1990, the appellant again wrote to the Government of India for extension of validity period as the first respondent had not sent the complete drawings. The letter reads as under:-

'Sub: Import of Designs & Drawings from M/s. Polytechna, Czechoslovakia, for the manufacture of Multi Colour, Two Colour/Perfecta Sheet fed Offset Printing Machine (485x660 mm), Single-Color Sheet fed Offset Printing Machine (381x520mm) worth Rs. 6,70,000/-.

Further to your letter No. G(7)/86-IM(II) dated 26th April, 1990, we would like to inform you that as indicated earlier, we had received the Designs & Drawings

against the approval No. EC(I)293/87/54(87)D dated 22.5.87 (and subsequently amended from time to time) granted by the Government of India. But, on examination of the relevant Designs & Drawings, we found that those are pertaining to OLD MODELS AD 725P and AD 515 that were concerning 1988-89, whereas the Collaborators have developed latest models of AD 725P/A and AD 515A. We have taken up this matter with the Foreign Collaborators and have insisted that we should be provided with the latest Designs & Drawings without which we will not be able to remit the Designs & Drawings' fees. After prolonged discussions, they have now agreed to supply the latest Designs & Drawings within the overall value of the approval of the Government of India.

We are, therefore, compelled to approach your goseflesh to approve extension of the validity of approval letter, referred to above, up to 30th April, 1991 so that we will be able to import the latest Designs & Drawings and remit the fees of Rs. 6,70,000/- to them against the Invoices of the Collaborators for such latest Designs & Drawings within the overall value approved by Government.

We now request you to kindly issue the necessary permission extending the validity as requested above.

Thanking you,'

22. On the 24th of April, 1991, the Government of India wrote to the appellant extending the validity period up to 30.9.1991. The letter reads as under :-

'Sub: Import of Designs & Drawings from M/s. Polytechna Foreign Trade Corporation, Panska 9, 112 45 Praha-1 Czechoslovakia, for Multi Colour, Two Colour/Perfecta Sheet fed Offset Printing Machine (485x660 mm), Single-Color Sheet fed Offset Printing Machine (381x520mm)-Request for amendment and extension in the validity period of approval letter-reg.

I am directed to refer to the correspondence resting with your letter dated 2.2.1991, addressed to IM(II) Section of this Department on the subject noted above, and to say that in view of the circumstances mentioned therein, it has been decided to permit you to import designs and drawings from M/s. Polytechna

Foreign Trade Corporation, Czechoslovakia, relating to their latest models of machines AD-725P/A and AD-515A, within the payment of Rs. 6,70,000 (Rupees six lakh seventy thousand only), subject to applicable Indian Taxes, already approved vide this Ministry's letter No. FC(I)/293(87)/54(87)-D, dated 22.5.87, as amended vide this Ministry's letter No. FC(I)/293(87)/Ext.113(87), dated 12th November 1987 and No. FC(I)293(87)/Ext.48(88), dated 24th May, 1988.

In view of the amendment allowed above, it has been decided as a special case to extend the validity of the aforesaid approval letter dated 22.5.87, for a period up to 30th September, 1991. Please note that no further extension beyond 30.9.91 will be permitted and you should complete the necessary formalities for import of designs & drawings within the validity period hereby extended.

3. Please acknowledge receipt.'

23. On the 27th of September, 1991, the first respondent wrote the following to the appellant :-

'For delivery of designs and drawings for Multi-colors, two-colour/perfecta sheet-fed offset printing machine (485x660mm) model AD 725 P/A and single colour Sheet fed offset printing machine (381x520mm) model AD 515 A we charge you for an amount of

670.000, - INR-201.000, - INR (Indian Tax)-----469,000, - INR-----

The above mentioned total amount of 469.000,- INR is payable to the account of Polytechna No. 01-00179002/0300 with Ceskorlovenska obchcdni banka, Napfikope 14, Prague, Czechoslovakia, Code No. 2530/810068 2530/810068 , ICO: 001031, Title: 24, within 3 months.

Price: 469.000.00 INR'

24. On the 8th of April, 1992, the Exchange Control Department of the Reserve Bank of India, granted permission to the appellant to remit the amount demanded by the first respondent and the letter reads as under:-

PERMISSION TO TRANSFER RUPEES TO A NON-RESIDENT BANK ACCOUNT.

CANARA BANK, DARIYA GANJ, NEW DELHI.

are hereby authorised to effect a remittance to CZECHOSLOVAKIA

as per particulars given below:

(1) Name and address of M/s. DOMINANT OFFSET applicant. (PVT.) LTD. NETAJI SUBHASH MARG, NEW DELHI-2.

(2) Amount sanctioned: Rs. 4,69,000/- (RUPEES FOUR LACS SIXTY- NINE THOUSAND ONLY)

(3) Name and address of CESHOSLOVENSKA OESHODNI transferee or BANKA, CZECHOSLOVAKIA full title of account A/C POLYLECHNA FOREIGN to be credited. TRADE CORPN. PANSKA 9, PRABHA CZECHOSLOVAKIA.

(4) Name of bank with UCO BANK PARLIAMENT whom the above STREET NEW DELHI., mentioned account is maintained:

(5) Purpose of remittance. IMPORT OF DRAWING/DESIGNS.

(6) Any condition/s subject AS PER FORWARDING to which the transfer LETTER. has been sanctioned:

VALUE NOT EXCEEDING RUPEES 4,69,000/- ONLY.'

25. Subsequent to this, the disputes had arisen, as I had noticed above, and the question of effective date became relevant.

26. The learned counsel for the appellant, Mr. Manider Singh, submitted that in the light of the language in the agreements and the addendum dated 14.8.1986 and when the RBI granted permission on the 8th of April, 1992 as per the terms of the addendum along with the terms of the agreement, the effective date for the purpose of the duration of the terms of the agreements could be only 8.4.1992 and not 22.5.1987. The learned counsel for the appellant, Mr. Maninder Singh,

submitted that the Hon'ble Arbitrator, though had referred to the addendum had not appreciated the scope of the terms and the addendum, and the Hon'ble Arbitrator had completely ignored the effect of the letter written by the first respondent on the 6th of May, 1988, which is already extracted.

27. The Hon'ble Arbitrator noted the submission on behalf of the appellant in the following terms:-

'It is urged by the claimant that the effective date for commencement of the period of eight years was to be date on which last approval required by law of respective countries, was to be granted for making the agreements valid and on the Indian authorities taking the said agreements on their records.'

28. It was submitted before the Hon'ble Arbitrator on behalf of the appellant :-

'It is pleaded by the claimant that due to such activities of the respondents the claimant who has invested huge amounts in establishing the infra-structure and plant for manufacturing the said machines suffered huge losses on account of India market being exploited by the respondents for sale of said machines manufactured by respondent No. 1 and imported to India through respondents 2 to 4. It is urged that business losses to the claimant are continuing. It is also alleged that respondent No. 1 has also violated the terms of agreements in not supplying the latest drawings of improved models of the said machines and has also not been supplying the necessary components.'

29. On behalf of the first respondent it was submitted before the Hon'ble Arbitrator, that the agreements had expired in July, 1994 or, in any case, in May, 1995, considering the effective date when the approval was granted by the Government of India on the 22nd of May, 1987. It was submitted on behalf of the first respondent before the Hon'ble Arbitrator :-

'It is also pleaded that the claimant had received the drawings of the machines in question on 18.8.1988, which was possible, only after the necessary approval had been granted by Government of India. It is urged that the claimant raised unnecessary controversy for delaying the payment that latest drawings of

improved models have not been received. However, the latest drawings were also sent to the claimant in September 1991. It is pleaded that subsequent permission, obtained from the Reserve Bank of India for making remittances, was only operational approval for performing the obligations under the agreements and was not the approval envisaged under the agreements for making the agreements valid. Hence at the most the effective date visualised in the agreements was the date on which Government of India gave its approval for importing the technology and know-how and the period of eight years is to be calculated from the said date of approval. Subsequent approvals being obtained by the claimant were operational approvals for performing the obligations of the agreements and have no relevancy for determining the 'effective date'. It is also argued that in fact no approval was needed in law for making the agreements valid and thus the 'effective date' was the date of execution of the agreements. The agreements on being signed became valid. It is contended that the claimant could not by his own acts of omission and commission postpone the 'effective date'.

30. The Hon'ble Arbitrator observed:-

'Counsel for the parties have agreed that the following material issues be decided on the basis of pleadings and the documents already placed on the record by the parties and no more evidence is to be led.

'b' Whether the said agreements are valid and subsisting?

I have heard detailed arguments on the issue and have perused the documents relied upon by the parties.

The arguments in question in their recitals mentioned that the licensor is to supply the licensee (the claimant in this case) the technical documentation and know-how and grant a license to the claimant the right to use said documentation and know-how for the manufacture, assembly, use and sale of the products (that is the printing machines mentioned in the agreements).

These agreements as per respective clause 1.01(b) were to remain in force for eighth anniversary of the effective date. The eight years period of license was to

be counted from the effective date.

Clause 1.01 (a) defines the 'effective date', to mean the date of the last approval required by law of the respective country of the parties for the agreement to become valid after signing of the agreements by the parties concerned and having been taken on record by the Indian authorities.

Sub clause 'd' defines 'information' to mean all technical, engineering and manufacturing information which during the period between the effective date and the date of expiry, the licensor may save utilized in its commercial production of the product.

Clause 2.02 stipulated that licensor agreed to transfer to the licensee the technical documentation as specified in the Annexure 2, within 12 months after the effective date on payment of agreed consideration.

It is not necessary to refer to other clauses of the agreements. Suffice to mention that the licensor was bound to continue to transfer technical documents and know-how of the improved machines if during the pendency of the agreements any further improvements were to be made in the said models of the printing machines.

What I have to determine in the present case is the meaning of the words 'effective date' as can be culled out from the wordings used in the agreements.'

31. It was submitted on behalf of the appellant before the Hon'ble Arbitrator that the agreements would become valid only from the date the necessary approvals has been given by the Government of India (Ministry of Industry) for import of technical documents and know-how, and by the Reserve Bank of India for the transfer of the consideration in the foreign exchange to the licensor. It was submitted on behalf of the first respondent before the Hon'ble Arbitrator :-

'The learned counsel for the respondents on the other hand, has argued that the agreements in question became valid contracts as soon as they were signed because these agreements met with all the requirements of the valid contract under the Contract Act and various permissions were needed from the authorities

in India for implementing the various obligations under the contracts. He has urged that in case no permission was to be given for import of technical know-how by the Indian authorities, the contracts may have been frustrated under Section 56 of the Contract Act as the obligations under the contracts might have become impossible to perform. He has urged that the 'effective date' as mentioned in the agreements, is the date when the contracts became valid under the laws of the respective countries of the parties. It is urged that there is no law relied upon by the claimant to show that any permission was required to make the agreements valid. Hence it is contended that agreements had expired on expiry of eight years from the date of execution of the agreements.

In the alternative, it is urged on behalf of the respondents that the moment the permission was given by the Indian authorities to import the know-how and technical documentation initially the contracts became valid and the period of eight years is to be counted from the said date of permission and even then these contracts had expired in 1995. It is argued that the last approval to be granted by the respective governments would mean that in case both the governments were required to give approval then the approval given last by the Government to make the contracts valid, would be the effective date. It is further contended that subsequent extensions taken by the claimant for getting technical documents and know-how were needed only for performing various obligations contemplated by the contracts. The learned counsel for the respondents has further contended that the determination of 'effective date' would not depend on acts of commission and omission of the parties. As already mentioned, the two agreements in question were admittedly executed on 18.7.1986 and 25.7.1986 respectively and on 14.8.1986 addendum were executed. Under the addendum it was agreed that the claimant should pay the consideration in lumpsum after the receipt of designs and drawings and after checking the same. The meaning of the 'effective date' as can be culled out from the wording used in the relevant clause of the agreements by no stretch of reasoning could go to the extent of date of release of consideration amount by the claimant.'

32. The learned counsel for the appellant, Mr. Maninder Singh, submitted that the Hon'ble Arbitrator having adverted to the addendum dated 14.8.1986 had not been

pleased to give the necessary scope of the addendum, and the Hon'ble Arbitrator observed:-

'The mutual performance of the obligations by the parties as laid down in the agreements, obviously have no bearing as to determination of 'effective date' as contemplated by the agreements. In case the parties intended to have any particular event to happen for determining the effective date, like date of payment of consideration or date of permission of the Reserve Bank of India to release the foreign exchange, the parties would have clearly mentioned so in the agreements.

Sec. 47(2)(3) of the Foreign Exchange Regulation Act, 1973 saves the rights of the persons to whom payment is due in foreign exchange, to file legal proceedings in India equivalent of amount in Indian Rupees if no permission is given by the Reserve Bank for releasing the foreign exchange. Assuming there is a breach of term of contract by the claimant in not making payment, or assuming that the claimant deliberately delayed taking permission from the Reserve Bank of India, the same would in my opinion have no bearing in determining the 'effective date' stipulated in the agreements. Contracts remain valid even if no permission is granted by the Reserve Bank for releasing the foreign exchange. The plea of the claimant that the 'effective date' should be taken as 8.4.1992 the date of letter of Reserve Bank of India releasing the foreign exchange for payment of consideration to the licensor, is of no merit and is negatived.'

33. According to the learned counsel for the appellant, this is not correct.

34. The learned counsel for the appellant, Mr. Maninder Singh, also submitted that the Hon'ble Arbitrator had not been pleased to appreciate the submission made on behalf of the appellant with reference to terms of the addendum and the delivery of the documents. The appellant never submitted that the effective date was to be linked with the delivery of documents, but according to the learned counsel for the appellant, Mr. Maninder Singh, the Hon'ble Arbitrator proceeded to observe :-

'The said language used in the relevant clause does not contemplate any repeated dates to be effective date. The effective date is not to go on changing on account of any acts of omission and commission of the parties. It is nowhere provided in

the agreements that effective date is to be linked with delivery of documents by the licensor. In case there is any breach of the terms of agreements with regard to delivery of technical documents the remedy of the claimant may be to seek damages if such a relief is available in law but that has no relevancy for determining the meaning of the effective date from the language used in defining the same in the agreements.'

35. On the basis of this reasoning, the Hon'ble Arbitrator came to the conclusion that 22.5.1987 would be the effective date.

36. The learned senior counsel for the first respondent Mr. V.N. Koura, submitted that the first respondent had acted in accordance with terms of the agreements. therefore, the reliance by the appellant on the order passed by the Reserve Bank of India on the 8th of April, 1992 cannot be accepted and that cannot be the effective date. According to the learned senior counsel, the order passed by the Reserve Bank of India was only to enable the appellant to make the payment and the appellant made the payment on the basis of this order and that cannot be the reason to make that date to be an effective date when the agreements were executed in 1986. The learned senior counsel submitted that the appellant, for the purpose of its case in the arbitration, has been admitted to along with it the period of effective date to get benefits of clause 5.02. which speaks of improvements effected by the first respondent and to get those benefits. According to the learned senior counsel for the first respondent Mr. V.N. Koura, the view taken by the Hon'ble Arbitrator is the only view possible on a true and correct construction of terms of the agreement and the addendum.

37. The learned senior counsel Mr. V.N. Koura submitted that the Hon'ble Arbitrator had considered the matter with reference to obtaining of permission from the Reserve Bank of India for payment.

38. The Hon'ble Arbitrator has referred to Section 47(2)(3) of the Foreign Exchange Regulation Act, 1973 and according to the learned senior counsel that cannot be determinative for the purpose of deciding the effective date. The learned senior counsel submitted that the Hon'ble Arbitrator had passed the award which has become final under the Act and if at all the appeal filed by the appellant could

be treated as an application for setting aside the award under Section 34 of the [Arbitration and Conciliation Act, 1996](#).

39. While meeting the submissions made by the learned senior counsel Mr. V.N. Koura, the learned counsel for the appellant Mr. Maninder Singh submitted assuming that the Hon'ble Arbitrator has passed an award the view taken by the Hon'ble Arbitrator is opposed to public policy within the meaning of Section 34 of the Act and, therefore, the award is liable to be set aside.

40. In view of the facts and circumstances, I direct the appeal to be treated an application for setting aside the award under Section 34 of the [Arbitration and Conciliation Act, 1996](#). Section 34 of the Act reads as under :-

'34. Application for setting aside arbitral award.- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains

decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this part; or

(b) the court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanationn.-Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal.

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.'

41. Under sub-section (2)(b)(ii) the arbitral award can be set aside if it is opposed to public policy of India.

42. The learned counsel for the appellant Mr. Maninder Singh submitted that the first respondent has attempted to say that payment by the appellant could be made without even permission from the Reserve Bank of India and that contention by the respondents have been accepted by the Hon'ble Arbitrator. The learned counsel developed the point by submitting if a party comes forward with a case that with reference to payment to be made in India to a Foreign Company permission from the Reserve Bank of India is a *sina qua non*. No Indian national can enter into an agreement with a foreign national for payment of any money without the permission of the Reserve Bank of India. And if that is done, that is not only contrary to the statutory provisions but is opposed to public policy.

43. The learned counsel Mr. Maninder Singh relied upon the judgment of the Supreme Court in *Renusagar Power Co. Ltd. Vs . General Electric Co. : AIR 1994 SC860* .

44. The learned senior counsel Mr. Koura submitted that the same point was debated before the Hon'ble Arbitrator and the Hon'ble Arbitrator had dealt with the submission in the light of Section 47 of the Foreign Exchange Regulation Act, 1973. Section 47 of the Foreign Exchange Regulation Act, 1973 reads as under:-

'47. Contracts in evasion of the Act.-

(1) No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order made thereunder.

(2) Any provision of, or having effect under, this Act that a thing shall not be done without the permission of the Central Government or the Reserve Bank, shall not render invalid any agreement by any person to do that thing, if it is a term of the agreement that that thing shall not be done unless permission is granted by the Central Government or the Reserve Bank, as the case may be; and it shall be an implied term of every contract governed by the law of any part of India that anything agreed to be done by any term of that contract which is prohibited to be done by or under any of the provisions of this Act except with the permission of the Central Government or the Reserve Bank, shall not be done unless such

permission is granted.

(3) Neither the provisions of this Act nor any term (whether express or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise, but-

(a) the said provisions shall apply to sums required to be paid by any judgment or order of any court as they apply in relation to other sums;

(b) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid; and

(c) for the purpose of considering whether or not to grant such permission, the Central Government or the Reserve Bank, as the case may be, may require the person entitled to the benefit of the judgment or order and the debtor under the judgments or order, to produce such documents and to give such information as may be specified in the requisition.

(4) Notwithstanding anything contained in the Negotiable Instruments Act, 1881 (26 of 1881), neither the provisions of this Act or of any rule, direction or order made thereunder, nor any condition, whether expressed or to be implied having regard to those provisions, that any payment shall not be made without permission under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note.

45. The parties in the instant case had conformed to the provisions of this Section and the parties had not acted contrary to any public policy in India. The learned senior counsel referred to the Explanationn to sub section 2(b) of Section 34 of the [Arbitration and Conciliation Act, 1996](#) and submitted that the statute itself had explained the scope of public policy by referring to Sections 75 and 81 of the Act.

The learned senior counsel submitted that the words 'public policy' is completely explained in the Explanationn. That is a very narrow construction of the provision. In the light of the language of the provision the construction sought to be made by the learned senior counsel is not accurate. But that does not affect the question involved in this case. There is no infringement of any public policy committed by the respondents. The Hon'ble Arbitrator has passed an award and the appellant could challenge only within the four corners of the provisions. When the award is not in conflict with any public policy, I do not find any ground available to the appellant to challenge the award.

46. I am quite unable to accept the submissions made on behalf of the appellant. The appeal treated as an application u/s. 34 of the [Arbitration and Conciliation Act, 1996](#) for setting aside the award is dismissed. There shall be no order as to costs.