ENFORCEMENT OF FOREIGN AWARD- WHEN CAN BE REFUSED

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Minimum interference with foreign awards has been hallmark of Indian legal system, which aims at securing smooth enforcement of a foreign award so that the award holder may enjoy the fruit of the foreign award. Indian law provides a very limited scope for refusal to enforcement of a foreign award. Prior to 1996, such scope was defined under the Foreign Award (Recognition and Enforcement) Act 1961 **("1961 Act")**. Post consolidation of laws relating to arbitrations in India in the year 1996, the issue of recognition and enforcement of foreign award is covered under Part II of the Arbitration and Conciliation Act, 1996 **("1996 Act")**. In essence, the provisions relating to enforcement of a foreign award under the 1961 Act are *pari materia* with the provisions in the 1996 Act. Recently the Hon'ble Supreme Court in the matter of **NAFED Vs Alimenta SA**[1], was dealing with a challenge to enforcement of a foreign award passed on 15.11.1989. As the Award was dated 15.11.1989, the applicable law was the 1961 Act.

Issues to be decided by the Indian Courts

Hon'ble Apex Court considered the following issues:

1. Whether NAFED was unable to comply with contractual obligation to export groundnut to Government's (Indian Government) refusal?
2. Whether NAFED could have been held liable in br each of contract to
   pay damages particularly in view of Clause 14 of t he Agreement? and
3. Whether enforcement of the award
   was against the public policy of India?

[1] 2020 SCC Online SC 381

FACTUAL MATRIX

- NAFED was canalizing agency for the Government of India for the exports of the commodity.
- NAFED had the permission of the Government of India to enter into exports for three years between 1977-80 but had no permission under the Export Control Order to carry forward the exports for the season 197980 to the year 1980-81.
- NAFED and Alimenta SA entered into an agreement dated 12.01.1980 for supply of 5000 metric tonnes of Indian HPS groundnut **("commodity").** The commodity was to be supplied during February, March and April 1980.
- The agreement was to be governed by the terms and conditions as per Federation of Oil, Seeds and Fats Associations Ltd. ("**FOSFA**"), London, 20 Contract, which is a standard form contract.
- The agreed price in the contract was USD 765 per metric tonnes (FOB).
- NAFED shipped only 1900 metric tonnes commodity under the agreement. The balance stock of 3100 metric tonnes could not be shipped as scheduled, due to the Government's restrictions.
- An addendum to the agreement was executed on 18.8.1980, changing the date of shipment for the balance 3100 metric tonnes, to November-December, 1980.
- On 8.10.1980, second addendum was executed by the parties agreeing for shipment of balance quantity during 1980-81 season.
- NAFED intended to perform the first Addendum, unwary of the fact that it had no permission under the Export Control Order to carry forward the export for the season 1979-80 to the next year 1980-81.
- Later on, NAFED approached Government of India to grant permission for effecting balance supply to Alimenta, which was refused. Government of India informed NAFED that the export of commodities was restricted under a quota system and that NAFED could not carry forward the previous year's commitment to the subsequent year and that the price of the commodity had escalated thrice in one year.
- NAFED finally informed Alimenta SA on 13.2.1981 that export of the contracted quantity was not possible because of Government of India's executive action banning such exports.
- Alimenta disputed the said position and initiated arbitration proceedings in terms of FOSFA.

Constitution of Arbitral Tribunal and passing of Award

- NAFED was asked to appoint its arbitrator.

- NAFED took the matter to Delhi High Court and to Hon'ble Supreme Court of India challenging the action of Alimenta.
- However, despite there being an interim injunction granted, first granted by the Delhi High Court and later by the Hon'ble Supreme Court, FOSFA nominated arbitrator on behalf of NAFED and commenced the arbitration proceedings.
- The arbitral tribunal so constituted published an award on 15.11.1989 thereby directing NAFED to pay to Alimenta a sum of USD 4,681,000 being the difference between the contracted price and the settlement price for the balance quantity. The Tribunal awarded also interest at the rate of 10.5% per annum from 13.2.1981 till the date of the award.
- In terms of the FOSFA Rules, NAFED filed an appeal before the Board of Appeal on 16.1.1990. NAFED also made request before the Board of Appeal to be represented through a legal representative. The Board, however, rejected the request made by NAFED and also decided the appeal against NAFED. The Board also enhanced the rate of interest from 10.5% p.a. awarded by the tribunal to 11.25% p.a.

Proceedings before Indian courts including Supreme Court

- Alimenta then filed a suit under section 5 & 6 of the 1961 Act seeking enforcement of the initial as well as appellate award passed by the FOSFA and Board of Appeal. NAFED unsuccessfully objected to the enforceability of award before a Single Judge and then before the Division Bench of Hon'ble Delhi High Court. Finally, NAFED filed appeal before the Hon'ble Supreme Court for adjudication on merit.
- Before the Hon'ble Supreme Court of India, NAFED objected to the enforcement of an award on the grounds, *inter alia,* that the award was passed without affording opportunity to NAFED its case [invoking Section 7 (1) (a) (ii) of the 1961 Act], and that the foreign award was against the public policy of India [Section 7 (1) (b) (ii) of the 1961 Act] and finally that the enforcement procedure is barred by limitation.
- On the contrary, Alimenta pleaded the minimum scope interference by the court in enforcement of foreign award, it disputed that the award was against the public policy. Alimenta submitted that the award was passed after recording the contentions of the parties and it was not open to the court to go into the correctness of the findings of the arbitrator.

Decision of the Supreme Court of India

Supreme Court held that in view of the provision contained in Clause 14[2] of the agreement, the agreement was a contingent contract and would stand cancelled if the shipment becomes impossible by reasons mentioned in the said clause. The court held that refusal by the Government came in the way of NAFED to affect the supply by exporting the commodity to Alimenta. This was covered by clause 14 of the agreement.

- Supreme Court held that NAFED was justified in not making the support as it would have violate Export Control Order, and it was not permissible to carry forward the quantity of the previous year to the next year without permission of the Government. The court held that apparently the contract came to an end in terms of clause 14 of the agreement. The contract became void in view of the provisions contained in Section 32[3] of the Indian Contract Act.
- The Apex Court culled out the distinction between frustration of contract as provided under Section 56[4] of the Contract Act and voidability of contingent contract as provided in Section 32 of the Contract Act. After detailed deliberation on the

[2] **14. Prohibition** : In the event, during the shipment period of prohibition of export of any other executive or legislative act by or on behalf of the Government of the country of origin or of the territory where the port/s or shipment named herein is/are situated, or of blockade or hostilities, restricting export, whether partially or otherwise, any such restriction shall be deemed by both the parties to apply to this contract and to the extend of such total or partial restriction to prevent fulfilment whether by shipment or by any other means whatsoever and to that extent this contract of any unfulfilled portion thereof shall be extended by 30 days.

In the event of shipment during the extended period still proving impossible by reason of any of the causes in this Clause, the contract or any unfulfilled part thereof shall be cancelled. Sellers invoking that Clause shall advice Buyers with due dispatch. If required, Sellers must produce proof to justify their claim for extension or cancellation under the clause.

[3] **Section 32 of the Indian Contract Act.** - Enforcement of contracts contingent on any event happening-. Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that even has happened.

[4]

Section 56. Agreement to do impossible act.

An agreement to do an act impossible in itself is void.

Contract to do an act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

distinction between the above said provisions, the Hon'ble court came to a conclusion that since both the parties in the said contract knew about contingency i.e. the inability to perform the contract on account of restriction imposed by government order, there was an agreement between the parties that in such an eventuality the parties shall be discharged from performing their obligations.

- Accordingly, the court held that NAFED cannot be held responsible for payment of compensation to Alimenta.
- As regard the issue as to whether the award would be contrary to public policy of India, the court traced the history of judicial interpretation of the expression "public policy" right from the stage when the said expression was interpreted in the judgment of **Renusagar Power Co. Ltd. Vs. General Electric Co[5].** In the said case the Supreme Court had held that enforcement of foreign award would be refused on the ground that it was contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian Law, (ii) the interest of India, and (iii) justice or morality.
- In the subsequent judgment of **ONGC Ltd. Vs SAW Pipes[6],** while dealing with a domestic award**,** the Supreme Court expanded the meaning of expression public policy and an award which is patent illegality would also be contrary to public policy.
- the Supreme Court also cited with approval the judgment in the case of **Shri Lal Mahal Limited v. Progetto Grano Spa[7], (2014) 2 SCC 433** wherein the supreme court had held that the public policy definition as explained in **ONGC Vs SAW Pipes** will have no application in the context of foreign award and the ground of patent illegality would not be available for refusal of enforcement of a foreign award.
- The court also noted its judgment in the case of **Ssanyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)[8],** where taking into account the latest amendments to the 1996 Act in the year 2015 & 2019, tit was held that the expression "public policy of India" will have the same narrow meaning as was defined in *Renusagar* judgment.
- After noticing the law laid down in various pronouncements, the Court concluded as under:

> *" It is apparent from the above-mentioned decisions as to enforceability of foreign award, Clause 14 of FOSFA Agreement and as per the law applicable in India, no export could have taken place without permission of the Government, and the NAFED, was unable to support, as it did not have any permission in the season 1980-81 to effect the supply, it required the permission of the Government. The matter is such which I pertains to the fundamental policy of India and parties were aware of it, and contracted that in such an*

[5] 1994 Supp (1) SCC 644
[6] (2003) 5 SCC 705
[7] (2014) 2 SCC 433
[8] (2019) 8 SCALE 41

> *exigency as pervaded in clause 14, the Agreement shall be cancelled for the supply which could not be made. It became void under section 32 of the Contract Act on happening of contingency. Thus, it was not open because of the clear terms of the Arbitration Agreement to saddle the liability upon the NAFED to pay damages as the contract became void……(para 68)*
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> *In our considered opinion, the award could not be said to be enforceable, given the provisions contained in Section 7(1)(b)(ii) of the Foreign Awards Act. As per the test laid down in Renusagar (supra), its enforcement would be against the fundamental policy of Indian Law and the basic concept of justice. Thus, we hold that award is unenforceable, and the High Court erred in law in holding otherwise in a perfunctory manner". (para 69)*

- Though with the aforesaid conclusion, there was no need of considering other contentions which were raised on behalf of NAFED, yet the court decided the same. As regards, objection on appointment of nominee of NAFED by FOSFA despite interim orders, the Court held that though it had passed an interim order, however, ultimately the petition filed by NAFED was dismissed in 1987. NAFED ought to have raised the question at the relevant time in the year 1987. Since no such issue was raised at the relevant time, the court refused to entertain the merit of the said argument.
- As regards, NAFED's plea of prejudice having been caused to it on account of non-representation by legal representative, the court noted that FOSFA Rule specifically prohibited representation of the parties through legal representative before the arbitral tribunal. Though Rule 6 permits legal representation at appeal stage, however, the court held that in the presence of proof of any prejudice caused to NAFED the award cannot be set aside on that ground.
- As regards, the issued that Alimenta's nominee arbitrator representing Alimenta before the Board of Appeal, the court did not decide the issue and merely observed that arbitrator was supposed to follow the ethical standards and ought not to have defended the arbitration award passed by him in subsequent judicial proceedings. The court further held that it was not open to the Board of Appeal to increase the interest in the absence of any appeal filed by Alimenta.
- The court however concluded that in view of its decision that the award was unenforceable under section 7 of the Foreign Awards Act, other submission did not survive for decision. Resultantly, the court allowed the appeal filed by NAFED holding the award to be unenforceable.

Conclusion

The expression "public policy" is wider than "laws of India". Therefore, mere contravention of law alone will not attract bar of public policy and something more than contravention of law is required. In NAFED's case, the court found the award to be contrary to fundamental policy of India because in terms the agreement between the parties, the contract stood cancelled

due to restriction put by Government of India. In such a case, it would be wholly unjust to hold NAFED liable to pay damages when there was no breach on its part. In India damages are compensatory in nature and a party complaining of breach of contract by the other cannot arrive at unjust enrichment on account of breach. A breach not causing any loss to the aggrieved party is not compensable, let alone a situation where there is no breach. It has been held by the court in yet another recent pronouncement in the case of **Vijay Karia and Others Vs Prysmian Cavi E Sistemi SRL and Others9** that for attracting the ground of fundamental policy of Indian law the violation must amount to a breach of some legal principles or legislation which is so basic to Indian law that it is not susceptible of being compromised. "Fundamental policy" refers to core value of India's public policy as a notion which may find expression not only in the statutes but also time honoured, hallowed principles which are followed by the courts.

It may not be possible to lay down straight jacket formula for deciding what would amount to public policy, as a ground for refusing enforcement of foreign award, however, the judgements cited in this article lay down broad guiding principles for understanding the meaning of expression 'public policy of India' in the context of testing enforceability of a foreign award.

[9] (2020) SCC online SC 177