

“As per the Indian Law and the ethical standards, the Arbitrator could not have appeared at the second stage to defend arbitration award passed by him”

[Case Brief] National Agricultural Cooperative Marketing Federation Of India V. Alimenta S.A

Case name: National Agricultural Cooperative Marketing Federation Of India V. Alimenta S.A

Case number/Citation: C.A. No.-000667-000667 / 2012 2020 (6) SCALE 642

Court: Supreme Court of India

Decided on: April 04, 2020

Relevant Act/Sections: FOSFA Guidelines

➤ **BRIEF FACTS AND PROCEDURAL HISTORY:**

1. In 1980, NAFED and Alimenta S.A entered into a contract under which NAFED would supply a fixed quantity of Indian HPS groundnut. Clause 11 of the contract incorporated the terms and conditions as per the FOSFA 20 (Federation of Oils, Seeds and Fats Association Ltd.) contract. Clause 14 of the FOSFA 20 contract provided that, in case of prohibition of export by executive order or by law, the contract would be treated as cancelled.
2. NAFED was only able to supply a part of the quantity stipulated in the contract. This led to the parties' executing two addenda, which allowed NAFED to supply the remaining quantity in the subsequent year. However, NAFED could not supply the outstanding quantity because it had no permission under the Indian government's Export Control Order- to carry forward the exports from the 1979-80 season to the subsequent year due to a restriction on exports under a quota system.

3. Alimenta treated this as a default and initiated arbitration proceedings before FOSFA, London. FOSFA passed an award in 1989 directing NAFED to pay \$4,681,000 as damages (along with interest), to Alimenta. This award was upheld by the FOSFA Board of Appeal in 1990.

➤ **ISSUE BEFORE THE COURT:**

1. Whether NAFED was unable to comply with the contractual obligation to export groundnut due to the Government's refusal?
2. Whether NAFED could have been held liable in breach of contract to pay damages particularly in view of Clause 14 of the Agreement?;
3. Whether enforcement of the award is against the public policy of India?

➤ **RATIO OF THE COURT:**

1. The Id. Counsels for applicants argued that enforcement of the award is barred by section 7(1) (a)(ii) of the Foreign Awards Act. The award is against the public policy of India on numerous grounds and thus is unenforceable under section 7(1)(b) of the Foreign Awards Act. The award/ decree does not deal with the restriction imposed by the Government of India as to the export of the commodity. Award flouts the basic norms of justice. The enforcement of such an award would result in the unjust enrichment of Alimenta S.A. at the cost of the very survival of the appellant organisation. The enforcement procedure is barred by limitation. The same was not brought within 30 days in terms of Article 119, Schedule I of the Limitation Act, 1963.
2. Learned senior counsel appearing on behalf of the respondent argued the scope of interference in the enforcement of the foreign award is limited. The award is not against public policy. The due opportunity was given to the NAFED to present its case in the arbitration proceedings. The question of imposition of ban by the Government was gone into by the Arbitral Tribunal, and conclusion was recorded that it was a self-imposed restriction by NAFED. There was no such ban on the export by the Government of India.
3. According to the court it was apparent from Clause 14 of the Agreement that during the contract shipment period in the event of the prohibition of export by an executive or legislative act by any of the Government of origin, such restriction shall be deemed by both the parties to apply to the contract. Thus, if the shipment becomes impossible by reasons mentioned in the clause, the agreement shall be cancelled.

4. The court observed that the Government of India issued a direction that was binding upon the NAFED. Without permission, it was not possible for the NAFED to carry out its obligation under the Contract and Addenda. It further stated that in Clause 14 of the Agreement, it was contemplated that during the contract if there is any prohibition of the export or any other executive or legislative Act by or on behalf the Government of the Country of origin, the unfulfilled part of the contract shall be cancelled.
5. Because of the refusal by the Government, it was not permissible to the NAFED to make a supply to the Alimenta S.A. Hence; the unfulfilled part was required to be cancelled. Thus, NAFED was justified in not making the supply as it would have violated the Export Control Order, and it was not permissible to carry forward the quantity of the previous year to the next year because of the Export Control Order without permission of the Government. 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 of the Indian Contract Act, 1881 (for short, Contract Act). The stipulation in Clause 14 releases both parties from the performance of the contract.
6. It further held that in this case, "expected event" was a refusal by the Government as agreed to under Clause 14 of the Agreement. On the happening of such an event, it is so fundamental as to be regarded by law as striking at the root. As such, we are of the opinion that the contract was rendered void in terms of section 32 of the Contract Act.
7. It would have been unlawful for NAFED to affect the supply in view of the Government's refusal to accord the permission, and both the parties knew it very well and agreed that the contract would be cancelled in such an exigency for non-supply in quantity. Thus, they were bound by the agreement. The award pre-supposes supply could have been made after the Government's refusal. If supply had been made, it would have been unlawful. Thus, the parties agreed for its cancellation as such an award is against the basic law and public policy as applied in India.
8. It was further held that the Government rightly objected to the supply being made at the rate of the previous season in the next season, particularly when the prices escalated thrice. The addendum was entered into subsequently, unfairly, and the parties fully understood that the Government would not permit export at the rate on which supply was proposed, and NAFED was acting only as a canalising agent of the Government of India.
9. Thus, for such an unfair contract, permission was rightly declined by the Government. In the previous year, the commodity could not be supplied due to force majeure. In no event, supply

could have been made in December 1980 and January 1981 sans permission from the Government of India.

10. The question also arose that when the award can be said to be contrary to public policy. This Court considered the issue in several decisions. The expression public policy concerning the agreement relates to the public policy of the country where award is being enforced. Section 23 of the Contract Act, 1872 deals with what consideration and objects are lawful and what not. If the court regards it as immoral or opposed to public policy, in that event, the consideration or object of agreement is said to be unlawful, and any agreement of which the object or consideration is unlawful is void.
11. The court further held that Clause 14 of FOSFA Agreement and as per the law applicable in India, no export could have taken place without the permission of the Government, and the NAFED was unable to supply, 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 pertains to the fundamental policy of India and parties were aware of it, and contracted that in such an exigency as provided 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.
12. 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. There was no permission to export commodity of the previous year in the next season, and then the Government declined permission to NAFED to supply. Thus, it would be against the fundamental public policy of India to enforce such an award, any supply made then would contravene the public policy of India relating to export for which permission of the Government of India was necessary.
13. According to the court, the award could not be said to be enforceable, given the provisions contained in Section 7(1)(b)(ii) of the Foreign Awards Act and that 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.
14. Before the Arbitration Tribunal, the rule debars legal representation; hence the submission as to non- \neg representation before the Tribunal, cannot be accepted. However, in appeal due to refusal to permit representation through a legal firm, the NAFED was not able to point out the prejudice caused to it.

15. In the absence of proof of prejudice caused due to non-representation by a Legal Representative and to show that it was disabled to put forth its views, the court refused to set aside the award on the ground that it would have been proper to allow the assistance of a Legal Representative. Thus, the court did not see it fit to render the award unenforceable on the aforesaid ground.
16. It was also held that as per the Indian Law and the ethical standards, the Arbitrator could not have appeared at the second stage to defend arbitration award passed by him, and should have kept aloof. However, no concrete material has been placed on record to substantiate the objection as to prevailing practice and law in U.K. at the relevant time. Suffice it to observe that Arbitrator is supposed to follow ethical standards, and, in our considered view, ought not to have defended arbitration award passed by him in the subsequent judicial proceedings.

➤ **DECISION HELD BY COURT:**

1. The court held that the award is ex facie illegal, and in contravention of fundamental law, no export without permission of the Government was permissible and without the consent of the Government quota could not have been forwarded to next season. The export without permission would have violated the law, thus, enforcement of such award would be violative of the public policy of India. On the happening of contingency agreed to by the parties in Clause 14 of the FOSFA Agreement the contract was rendered unenforceable under section 32 of the Contract Act. As such the NAFED could not have been held liable to pay damages under foreign award.
2. The application was allowed.