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Brief Note on the judgment dated 22nd April, 2020 of the Supreme Court of India in

National Agricultural Cooperative Marketing Federation of India (NAFED) v. Alimenta S.A

Civil Appeal No. 667 of 2012

Decided on 22.04.2020 by the Supreme Court of India

NAFED and Alimenta S.A entered into an agreement dated 12.01.1980 for supply of 5000 mt of Indian HPS groundnut, terms and conditions were to be as per FOSFA 20 standard form on CIF terms. But only 1900 mt out of 5000 could be shipped. However an Addendum dated 08.10.1980 came to be signed for supply of 3100 mt groundnuts during the 1980-81 crop season in new double gunny bags with the buyers paying an additional USD 15 per mt. Owing to the restrictions placed by the Ministry of Agriculture, Government of India regarding export of commodities, NAFED vide letter dated 13.02.1981 informed Alimenta that it was not possible to export the commodity on account of orders passed by the Government of India banning such exports. Alimenta S.A commenced arbitration proceedings before FOSFA, London which were challenged by NAFED before Delhi High Court, which were subsequently upheld by the Supreme Court vide its order dated 09.01.1987. Proceedings before FOSFA culminated into an award dated 15.11.1989 in favor of Alimenta S.A whereby NAFED was directed to pay a sum of USD 4,681,000 with interest at the rate of 10.5% per annum to Alimenta S.A. On an appeal filed by NAFED, the Board of Appeal enhanced the interest to 11.25%.

Supreme Court of India was dealing with the issue of enforceability of an Award dated 15.11.1989 passed by FOSFA Arbitration Tribunal. Buyer Alimenta S.A filed a suit before Delhi High Court seeking enforcement of Award passed by FOSFA and the Board of Appeal. NAFED filed objections inter alia on the ground of award being opposed to public policy and non-compliance with the provisions of section 7 (1) (a), (b) & (c) of Foreign Awards Act. Ld. Singh Judge, vide judgment and Decree dated 28.01.2000, held the award to be enforceable. NAFED challenged the Decree before the Appellate Division of the High Court of Delhi and then before the Supreme Court. Subsequently, Alimenta S.A moved the Delhi High Court seeking execution of Decree, which was challenged by NAFED before the appellate division of the Delhi High Court and then before the Supreme Court vide Civil Appeal No 667 of 2012. In its judgment, the Supreme Court held the award was *ex facie* illegal and in contravention of fundamental law and could not be enforced on the following grounds;

a. Supreme Court rejected the finding of the High Court that it was a case of self-induced frustration on the part of NAFED. Supreme Court relied on Clause 14 of the FOSFA 20 Standard Form to hold that parties had entered into a contingent contract as it was contemplated by the parties that if there was prohibition of exports or any other executive or legislative act by the government in the country of origin, the unfulfilled part shall be cancelled. In view of the restrictions placed by the government, it was not possible for NAFED to supply the goods as agreed as in NAFED would have violated the order if it would have made the supply. Thus NAFED was justified in not making the supply. It was held that the contract became void in view of provision contained in section 32 of Contract Act and on account of stipulation contained in clause 14 both the parties stood released from performance of contract. Supreme Court found that refusal of the permission from the government to ship the goods, was fundamental and struck the very roots of the contract. Clause 14 of FOSFA 20 Standard Form, Section 32 & 56 of The Indian Contract Act are reproduced as follows;

> *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 situate, or of blockade or hostilities, restricting export, whether partially or otherwise, any such restriction shall be deemed by both parties to apply to this contract and to the extent 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.*
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> ***Section-32. Enforcement of contracts contingent on an 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 event has happened. If the event becomes impossible, such contracts become void.*
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> ***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.*
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> ***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 nonperformance of the promise.*

b. The concept of frustration is defined under section 56 of The Indian Contract Act and Contingent Contracts are defined under section 32 of the same act. Supreme Court then went to define the clear distinction between sections 32 & 56. It was observed that the present contract was a contingent contract in view of language used in clause 14 and as a result, section 32 of the Indian Contract would be attracted and not section 56. It was held that Doctrine of Frustration in section 56, comes into play where the contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. Section 56 is not attracted when the parties have contemplated happening of certain events and when such events happen, then it is section 32 that comes into play. It is when that contingency happens, the contract becomes void. In such scenarios, the dissolution of contract takes place in accordance with the terms of the contract. The judgment discussed the law on doctrine of frustration, ad applicability of sections 32 and 56 of Indian Contract Act, as held by the Supreme Court in *Satyabrata Ghose v Mugneeram Baingur & Co AIR 1954 SC 44*, *Naihati Jute Mills v Khyali Ram Jagannath AIR 1968 SC 522*. In these cases, Supreme Court also examined the legal position if the contracts contained express or implied terms regarding parties being discharged on account of happening of certain contingency. It was held, in such a case, parties would stand discharged from their contractual liabilities. The effect of decisions of English Courts on the issue of Doctrine of Frustration, were held to be of persuasive value and were not binding in view of mandate of section 56 where the courts in India are only required to look at the doctrine of intervening impossibility or illegality and not at any event that has frustrated the contract arises from the act of parties.

c. On the issue of liability to pay damages under contract, it was held that due to government not giving consent, NAFED became incapable of performance and therefore could not have been made liable to pay any damages.

d. On the issue of enforceability of award under section 7 (1) (a), (b) & (c) of Foreign Awards Act, Supreme Court cited one of its decision in *Renusagar Power Co. Ltd. v General Electric Co. (1994) Supp. 1 SCC 644*, where Supreme Court had held that the enforcement of foreign award would be refused on the ground that it was contrary to public policy if such enforcement would be contrary to 1. fundamental policy of Indian Law, 2 Interest of India, 3. justice or morality. Holding that the award was against the public policy as envisaged under section 7 of the Foreign Awards Act, as NAFED could not have supplied without prior permission from the government and could not have even carried forward last year's supply to the next year, as permission was also require for that. It was held that enforcement of such an award in violation of export policy and government order would be against the public policy of India.

This decision is of great significance in terms of the distinction drawn between frustration of contracts and sections 32 & 56 of Indian Contract Act. The distinction is particularly important in the current situation under OCVID-19 where the issue of frustration of contracts and force majeure clauses is being widely and hotly discussed. The other noteworthy point that arises for consideration in this judgment is the difference highlighted in the concept of doctrine of frustration in Indian laws and English laws. While considering the applicability of sections 32 & 56 of the Indian Contracts Act, including Doctrine of Frustration and Force Majeure, every case is to be looked into specifically especially in the terms and conditions agreed upon by the parties. Interestingly, Ministry of Finance, Government of India has vide its Notification dated 19.02.2020 has clarified that disruption of supply chains due to spread of Corona virus should be considered as a natural calamity and Force Majeure clauses should be invoked.

Note. Foreign Awards Act stands repealed by the Arbitration and Conciliation Act, 1996