



Thereafter, by an addendum dated October 8, 1980 an agreement was executed for the supply of the specified quantity of the Commodity that would be shipped during the 1980-81 (both the addendums are collectively referred to as **Addendums**).

### *GOI restrictions on export*

- By a letter dated December 1, 1980, the Ministry of Agriculture, GOI, directed NAFED not to ship any leftover quantities of the Commodity from previous years. The export of commodities was restricted under a quota system and NAFED could not carry forward the previous years' commitment to the subsequent year. Further, the price of the commodity had escalated thrice than the prevailing price within one year. The GOI informed NAFED not to implement the previous year contract. While NAFED sought permission from the GOI through various correspondence, the GOI rejected all such requests.
- On February 13, 1981, NAFED informed Alimenta that export of the contracted quantity of the Commodity was not possible due to GOI's restrictive export policy and quota ceiling.

### *Alimenta invokes Arbitration against NAFED*

- Disputes arose between Alimenta and NAFED, and on February 13, 1981, Alimenta invoked arbitration before the Federation of Oil, Seeds and Fats Associations Ltd. (**FOSFA**), London. Amongst other correspondence, Alimenta called upon NAFED to appoint an arbitrator within twenty-one days. NAFED requested for extension of time for appointing an arbitrator.

### *NAFED seeks stay on arbitration proceedings*

- In the meanwhile, on March 19, 1981, NAFED filed a petition before the High Court of Delhi (**High Court**) against Alimenta and sought a stay against Alimenta S.A. and FOSFA from continuing the arbitration proceedings inter alia on the ground that agreement did not contain any specific provision for arbitration.
- By an order dated March 20, 1981, the High Court stayed the arbitration proceedings till the period so specified (**Stay Order**). Acting in contravention of the Stay Order, Alimenta and FOSFA proceeded with the arbitration and appointed an arbitrator on behalf of NAFED despite NAFED's correspondences urging Alimenta to comply with the Stay Order. In the circumstances, NAFED filed proceedings for contempt.
- Meanwhile, the High Court decided the arbitration proceedings and Alimenta filed a special leave petition before the Supreme Court. While the Supreme Court passed an order dated April 30, 1982 restraining Alimenta and FOSFA to proceed further in the arbitration, on May 4, 1982, FOSFA sent a telex that the Supreme Court had no power to act in the matter nor to stay the arbitration and continued with the proceedings.
- By an order dated January 9, 1987, the Supreme Court upheld the decision of the High Court viz. under the First Agreement, the parties were relegated to pending arbitration, under, the Second Agreement, as there was no arbitration clause, the parties were relegated to the civil proceedings.
- On November 15, 1989, FOSFA passed an Award against NAFED (**Award**) and directed NAFED to pay damages along with interest, till the date of the Award.

### *NAFED files an appeal against the award before the Board of Appeal*

- Aggrieved by the Award, NAFED filed an appeal before the Board of Appeal, and made requests for legal representation before the Board of Appeal considering there were special circumstances and Indian law was required to be explained. However, the said requests for legal representation were rejected. Eventually, NAFED was directed to pay interest components at the rate of 11.25% instead of 10.5% p.a (**Appellate Award**). The interest was enhanced in the absence of an appeal by Alimenta.

### *Alimenta files an application for Enforcement of the Award in India*

- Alimenta filed a petition under sections 5 and 6 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (**Foreign Awards Act**) seeking enforcement of the Award and the Appellate Award. The Ld. Single Judge of the High Court decided the matter against NAFED and held the Award to be enforceable (**Enforcement Order**). A review was sought, which too was dismissed.

### *NAFED files appeal against Enforcement Order*

- Thereafter, NAFED filed an appeal against the Enforcement Order before the Division Bench of the High Court. On February 28, 2001, the High Court entertained the appeal and stayed the execution. On September 9, 2002,

Alimenta filed an Execution Petition (**Execution Petition**) seeking execution of the decree passed before the High Court.

- Eventually, the appeal was rejected for want of maintainability. Aggrieved by the said order, NAFED filed Civil Appeal before the Supreme Court for adjudication on merits. The issues which arose before the Supreme Court were whether (i) NAFED was unable to carry out contractual obligation in view of GOI's refusal to export, as such the contract became void and unenforceable and (ii) whether the ground that prohibitions to supply were imposed by GOI was sufficient to render the award unenforceable in terms of the provisions contained in Section 7 of the Foreign Awards Act.

## FINDINGS

### *NAFED was justified in not making the supply of the Commodity*

- Upon examining the communications exchanged between NAFED and GOI and clause 14 of the First Agreement, the Supreme Court observed that (i) GOI issued a direction that was binding upon the NAFED and without permission, it was not possible for the NAFED to carry out its obligation under the First Agreement and Addendums; and (ii) 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.
- The Supreme Court observed that due to GOI's refusal, it was not permissible for NAFED to make a supply to the Alimenta and therefore, 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 of the GOI.

### *Section 32 of the Contract Act is applicable*

- The Supreme Court examined *Satyabrata Ghose*<sup>2</sup>, *Naihati Jute Mills*<sup>3</sup>, *Boothalinga Agencies*<sup>4</sup> and *Smt. Sushila Devi*<sup>5</sup>, to determine whether section 32 or section 56 of the Indian Contract Act, 1872 (**Contract Act**) would be applicable to the present case. The Supreme Court inter alia observed as follows:
  - Section 56 of the Contract Act deals with the agreement to do an impossible act or to do acts which subsequently become impossible or unlawful. It also provides for liability of the promisor to do something which he knew or might have known with reasonable diligence as an act which is impossible or unlawful; as such, the promisor must make compensation for the non-performance of the promise.
  - Section 32 of the Contract Act applies in case the agreement itself provides for contingencies upon happening of which contract cannot be carried out and provide the consequences.
  - Clause 14 settles that the parties have agreed for a contingent contract. They knew very well that the Government's executive, or legislative actions might come in the way as provided in Clause 14. Thus, in this case, section 32 of the Contract Act is attracted and not the provisions of section 56.
  - The contract was capable of being performed in case GOI gave the requisite authorization. It is not an event that was not in contemplation at the time of entering into the agreement. GOI did not give the permission and thus, the contract became void on the happening of the contingency, as provided in section 32 of the Contract Act.

### *The contract became void pursuant to section 32*

- The Supreme Court relied upon *Ram Kumar*<sup>6</sup>, and *Kunjilal*<sup>7</sup>, whereunder the contracts for supply of goods could not be fulfilled due to government restrictions. Accordingly, the contract was held to be void and impossible of performance. Relying upon the said cases, the Supreme Court observed that as the GOI did not give consent, the First Agreement became incapable of performance, and therefore, NAFED could not have been fastened with the liability to pay the enforceable contract damages.
- Examining the merits of GOI's decision, the Supreme Court observed that - the GOI 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 Addendums were entered into subsequently, unfairly, and the parties fully understood that the GOI would

<sup>2</sup> *Satyabrata Ghose v. Mugneeram Bangur & Co.*, AIR 1954 SC 44,

<sup>3</sup> *Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, AIR 1968 SC 522

<sup>4</sup> *Boothalinga Agencies v. V.T.C. Poriaswami Nadar*, AIR 1969 SC 110

<sup>5</sup> *Smt. Sushila Devi v. Hari Singh*, (1971) 2 SCC 288,

<sup>6</sup> *Ram Kumar v. P.C. Roy & Co. (India) Ltd.*, AIR 1952 Cal. 335 (338).

<sup>7</sup> *Kunjilal Manohar Das v. Durga Prasad Debi Prosad*, AIR 1920 Cal. 1021 (1024).

not permit export at the rate on which supply was proposed. Thus, for such an unfair contract, permission was rightly declined by the GOI.

### **Against the fundamental public policy of India to enforce the Award**

- The Supreme Court examined section 7 of the Foreign Awards Act (conditions for enforcement of foreign awards) and judicial precedents to determine if the Award is contrary to **public policy**, namely *Central Inland*<sup>8</sup>, *Renusagar Power*<sup>9</sup>, *Sri Lal Mahal*<sup>10</sup>, *Associate Builders*<sup>11</sup>, and *Ssangyong*<sup>12</sup>. The relevant observations of the Supreme Court are carved out below:
  - In view of the precedent on enforceability of foreign awards, Clause 14 and the law applicable in India, no export could have taken place without the permission of GOI.
  - NAFED was unable to supply, as it did not have any permission in the season 1980-81 to effect the supply. The matter pertains to the fundamental policy of India and parties were aware of it and contracted that in such an exigency clause 14 would apply.
  - The First Agreement became void under section 32 of the Contract Act on happening of contingency. Thus, the liability could not be saddled upon the NAFED to pay damages as the contract itself became void in the absence of permission from GOI to export commodity of the previous year in the next season.
  - Applying the test laid down in *Renusagar Power*, enforcement of the Award would be against the fundamental policy of Indian Law and the basic concept of justice.
  - *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.*
- In view of the above, the apex court held that pursuant to section 7 (1) (b)(ii) of the Foreign Awards Act, the Award was not enforceable.

### **CONCLUSION AND ANALYSIS**

- The Supreme Court allowed the appeal filed by the NAFED and the impugned judgment and order passed by the High Court was set aside. The Award was held to be unenforceable, with no order as to costs.
- The Supreme Court held that on the happening of contingency agreed to by the parties in clause 14, 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. The Supreme Court concluded that the Award was *ex facie* illegal, and in contravention of fundamental law. The export without GOI's permission would have violated the law, thus, enforcement of such award would be violative of the public policy of India. While the Supreme Court clarified its findings on the other issues raised by the parties, the Award was rendered unenforceable basis the foregoing grounds.
- At the first blush, a comparison of the present ruling with the Supreme Court's ruling in *Vijay Karia* shows some dichotomy – while in *Vijay Karia*<sup>13</sup> the Court upheld that contravention of a statutory provision, particularly FEMA is not violation of fundamental policy of Indian law, in the present decision the Court has in effect ruled that the export requiring permission from the government is a matter of fundamental policy of India. However, it is arguable that the present case can be distinguished on facts, more specifically on the nature of prohibition as compared to the contravention of FEMA in *Vijay Karia*. In the present case, the nature of the **prohibition** of the GOI could not be rectified and the contract became void, which may arguably be distinguished from an award in contravention of FEMA. Having said that, in the present decision, the Supreme Court has not referred to *Vijay Karia*.
- With the present decision it remains to be seen whether the scope of challenge to enforcement of a foreign award has now been widened.

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<sup>8</sup> *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, (1986) 3 SCC 156.

<sup>9</sup> *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644.

<sup>10</sup> *Shri Lal Mahal Limited v. Progetto Grano Spa*, (2014) 2 SCC 433.

<sup>11</sup> *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49.

<sup>12</sup> *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHA)*, (2019) 8 SCALE 41.

<sup>13</sup> *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, 2020 SCC OnLine SC 177.