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HAS SUPREME COURT TAKEN A STEP BACK IN ITS RECENT JUDGMENT IN "NAFED VS. ALIMENTA S.A."?

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The Supreme Court on April 22, 2020 declared a foreign award unenforceable on the ground that one of the provisions of the Agreement in question was hit by Section 32 of the Indian Contract Act, 1872 and thus violative of public policy of India.

Brief Background:

1. NAFED and Alimenta S.A. entered into a contract dated January 12, 1980 ("first agreement") for the supply of 5,000 metric tonnes of Indian HPS groundnut ("commodity"). Clause 11 therein provided that terms and conditions would be as per FOSFA (Federation of Oil, Seeds and Fats Associations Ltd., London), 20 Contract, a standard form of contract which pertains to the CIF contract. NAFED was a canalizing agency for the Government of India for the exports of the commodity and therefor for any export, to be carried forward to next year from the previous year, NAFED required the express permission and consent of the Government of India. While the contracted quantity was 5000 metric tonnes, only 1900 metric tonnes could be shipped. The remaining quantity could not be shipped due to damage caused to crop by cyclone etc. in the Saurashtra region. The transaction was governed by covenants such as Force Majeure and Prohibition contained in Clause 14 of the Agreement, whereby in case of prohibition of export by executive order or by law, the agreement would be treated as cancelled. On October 8, 1980, second Addendum to first Agreement came to be executed between the parties for supply of 3100 metric tonnes of the commodity.

2. Pertinently, NAFED was permitted by the Government of India to enter into exports for three years between 1977-80 but it had no permission under the Export Control Order to carry forward the exports for the season 1979-80 to the year 1980-81. At the time of execution of the Addendum, NAFED claimed it was unaware of the said situation of not having requisite authority to enter into the Addendum. Being a Canalizing agency for the Government of India, NAFED could not carry forward the

supply for the subsequent year. NAFED approached the Government of India to grant permission. The Ministry of Agriculture, Government of India directed NAFED not to ship any leftover quantities from previous years. It was made clear that the export of commodities was restricted under a quota system and that NAFED could not carry forward the previous years' commitment to the subsequent year.

3. Pursuant to the aforesaid, Alimenta S.A. initiated arbitration proceedings before FOSFA and asked NAFED to appoint an Arbitrator within 21 days. NAFED obtained a stay order from the Delhi High Court on the ongoing arbitration proceedings. However, FOSFA appointed an Arbitrator on behalf of the NAFED on April 23, 1981. Similar prohibitory order was also passed by the Supreme Court, but FOSFA took a stand during the arbitration proceedings that courts in India had no power to act in the matter nor to stay the arbitration. Ultimately, the parties were relegated to pending arbitration by the Supreme Court in so far as first agreement was concerned.

4. FOSFA passed an award on November 15, 1989 by which NAFED was directed to pay a sum of USD 4,681,000. The amount was ordered to be paid with interest at the rate of 10.5% per annum from February 13, 1981 till the date of the award.

5. Being aggrieved by the award, NAFED filed an appeal before the Board of Appeal on January 16, 1990. The Board of Appeal on September 14, 1990 while deciding the appeal compounded NAFED's issues by enhancing the award, even though Alimenta S.A. had not filed any appeal. NAFED was directed to pay interest components at the rate of 11.25% instead of 10.5% p.a. Alimenta S.A. filed a suit before the Delhi High Court under Sections 5 and 6 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (for short, "the Foreign Awards Act") seeking enforcement of the initial as well as appellate award passed by the FOSFA and Board of Appeal.

6. NAFED had objected to the enforceability of the award, on the following grounds

   (i) That it was opposed to the public policy as such unenforceable.
   (ii) There was noncompliance with the provisions contained in Section 7(1)(a), (b), and (c) of the Foreign Awards Act.
   (iii) No notice under Section 101 of the Multi State Cooperative Societies Act was given.
   (iv) The execution was also barred by limitation. It ought to have been filed within 30 days because of Article 119 of Schedule I of the Limitation Act, 1963, and the period of three years was not available to seek its enforcement.

7. The learned Single Judge of the High Court placed its reliance upon the ratio of the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.*[1] and vide order dated January 28, 2000 held the award enforceable and non-violative of public policy of India. All the other questions raised by NAFED qua procedural flaws and limitation were decided against it.

8. The aforesaid order of Delhi High Court dated January 28, 2000 was under challenge in the subject appeal and vide the judgment under discussion, the Supreme Court held the foreign award to be violative of fundamental policy of Indian law.

Observation of the Supreme Court:

As per the Supreme Court, 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 Indian Contract Act, 1872 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. 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.

The Supreme Court opined that 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, its enforcement would be against the fundamental policy of Indian Law and the basic concept of justice. Thus, the Supreme Court concluded that the High Court committed an error and award was held unenforceable.

Critical appraisal of the Judgment

A thorough review of this judgment would suggest that the Supreme Court has gone into the merits of the case which is contrary to the view taken by it in its recent judgments while dealing with objections against the enforcement of foreign award under Section 7 of the Foreign Awards Act, 1961 or under Section 48 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act").

[1] 1994 Supp. (1) SCC 644

The Supreme Court referred to **Shri Lal Mahal Ltd. v. Progetto Grano SPA**[2], which made it clear that the position held by **Renusagar** would continue to apply to cases which arose under Section 48(2)(b) of the Arbitration Act. It is pertinent to mention that the grounds prescribed under Section 7 of the Foreign Awards Act, 1961 were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"], which is almost identical to Sections 34 and 48 of the Arbitration Act.

The Supreme Court in Renusagar had held that the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Foreign Awards Act and does not enable a party to the said proceedings to **impeach the award on merits and** the defence of public policy under Section 7(1) (b)(ii) should be construed narrowly. These observations made in Renusagar were not considered by the Supreme Court while placing its reliance on the same judgment for holding the enforcement of foreign award as violative of public policy of India.

The Supreme Court also overlooked its most recent judgment dated February 13, 2020 in "Vijay Karia & Ors. Vs. Prysmian Cavi E Sistemi SRL & Ors.[3]" In this judgment, the Supreme Court, while applying the law settled by Renusagar and considering the New York Convention, expressly noted that the signatories to the New York Convention had recognized that a key theme of the Convention was a "pro-enforcement bias". The Supreme Court had further held that the burden of proof on parties seeking enforcement has now been placed on parties objecting to enforcement and not the other way around; in the guise of public policy of the country involved, **foreign awards cannot be set aside by second guessing the arbitrator's interpretation of the agreement of the parties**; the challenge procedure in the primary jurisdiction gives more leeway to Courts to interfere with an award than the narrow restrictive grounds contained in the New York Convention when a foreign award's enforcement is resisted. In nutshell, in Vijay Karia (Supra), the Supreme Court was faced with the question whether the violation of FEMA rules while enforcing the foreign award would amount to a violation of the fundamental policy of Indian law. In this context, the Supreme Court held that **contravention of any provision of an enactment would not be synonymous with contravention of the fundamental policy of Indian law**. Indeed, the foreign awards would ordinarily be based on foreign law and such laws might not be in conformity with the laws of the country in which enforcement was being sought. As observed by the Supreme Court, **one of the principal objectives of the New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity to the national laws**. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise. In this context, the Supreme Court observed that the "Fundamental Policy" refers to the core

[2] (2014) 2 SCC 433

[3] Civil Appeal No. 1544 of 2020

values of India's public policy as a nation, which may find expression not only in statutes but also time-honored, hallowed principles which are followed by the Courts.

The Supreme Court in Vijay Karia's case had also observed that if courts of the enforcing country refused enforcement of such awards merely on account of contravention with local laws, the object and purpose of the Convention would be defeated. The Court was of the view that **a contravention of a provision of law is insufficient to invoke the defence of public policy when it comes to enforcement of a foreign award**.

Seen in this context, the Supreme Court observed that fundamental policy of Indian law could only mean fundamental and substantive legislative policy which forms the bedrock of Indian laws, and not a mere provision of any enactment. The Supreme Court also observed that the expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment.

In the present case of NAFED, the Supreme Court chose to tow a different line from Renusgar, Ssangyong[4], Associate Builders[5] and more particularly recently passed judgment of Vijay Karia, which adopted a more "pro-enforcement" approach and discouraged litigating parties from reappreciation of merits and/or errors of the arbitrator (both fact as well as law) at the stage of enforcement of foreign award.

Only time will tell, whether this judgment will pave the way for parties, in the guise of public policy, to seek setting aside of the foreign award by second guessing the arbitrator's interpretation of the agreement of the parties, which has never been the intent of the of contracting parties of the New York Convention and Section 7 of the Foreign Awards as well as Section 48 of the Arbitration Act.

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[4] (2019) 15 SCC 131
[5] (2015) 3 SCC 49