"Unruly Horse On A Run": NAFED v. Alimenta S.A.
written by Gaurav Singh Gaur | May 31, 2020

A Surprising Turn of Events in the Case NAFED v Alimenta SA

THE UNRULY HORSE

Since the inception of international commercial arbitration, one of the primary concerns with public policy is the subjective tolerance or intolerance for foreign repugnant laws. It was apprehended that it might result in judicial inertia leading to incorrect legal analysis and conclusions. Many judges have expressed their serious concerns over the use of public policy except in limited and well-defined situations.

A similar view was well articulated by Chief Justice Best of the United Kingdom in *Richardson v. Mellish*[1]. According to him, the use of public policy is only appropriate when the applicable policy is not in doubt. The legislature of a state is better equipped to settle the doubtful questions about public policy. In support of the position taken by Chief Justice Best, Justice Burrough expressed his concerns in the same case in the following terms:

"I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law." [2]

TAMING THE UNRULY HORSE

The principle of judicial non-interference in arbitral proceedings, more specifically in the context of the foreign awards, is an established norm that fosters minimal interference model for the judiciary in proceedings pertaining to the enforcement of foreign awards.

As per Section 7(1) (a), (b) of the Foreign Awards (Recognition and Enforcement) Act, 1961 read with Section 48 of the Arbitration and Conciliation Act, 1996, the scope of enforcement of a foreign arbitral award is extremely limited. One amongst other grounds for refusal of enforcement of an award is it being "contrary to public policy". In its celebrated decision, the Apex Court of India in *Renusagar Power Co. Ltd. v. General Electric Co.*[3], while interpreting the expression "public policy" held that the enforcement of a foreign award can be refused only on the ground that the same is contrary to the "public policy" of India. The award shall be against the public policy if the same is contrary to:

(i) the fundamental policy of the Indian law; or

(ii) the interest of India; or

(iii) justice or morality.

The Court in Renusagar further emphasised that the defence of the public policy, permissible under section 7(1)(b)(ii), must be construed narrowly. The said observations set the foundation for subsequent pronouncements regarding the interpretation of the said term. The same also paved the way

for the Arbitration and Conciliation (Amendment) Act, 2015.
In another notable decision of the Supreme Court in Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, [4] the Court further affirmed that the scope of the grounds of "public policy" available for refusing enforcement of foreign arbitral awards is narrower as compared to the grounds available for interfering with domestic awards. The Court further held that an additional ground of "patent illegality" appearing on the face of the award is available in so far as domestic awards are concerned. However the same is only attributed to such illegality which goes to the root of the matter, excluding the erroneous application of the law by an arbitral tribunal or re-appreciation of evidence by an appellate court. These precedents cemented the principle of judicial non-interference and narrow construction of the public policy grounds, particularly in the context of foreign awards.

BLURRING BOUNDARIES

Recently, in an interesting turn of events, the Hon'ble Supreme Court of India in its judgment dated April 22, 2020 in the case of *NAFED v. Alimenta S.A.*[5] refused to enforce an award passed by the Federation of Oil, Seeds and Fats Associations Ltd. ('FOSFA'), on account of it being ex-facie illegal and in violation of the public policy of India. The said case was relating to the export of HPS groundnuts to Alimenta S.A. by the National Agriculture Cooperative Marketing Federation of India ("NAFED"), a canalizing agency of Ministry of Commerce for HPS Groundnuts.

Because of the ban on the export of the HPS groundnuts, imposed by the Government of India ('GoI'), NAFED was unable to perform its contractual obligations. It is also pertinent to note that under clause 14 headed as "prohibition clause" in the said contract between the parties, it was specifically agreed that in event of prohibition of export by any executive order or legislative act, the contract or any unfulfilled part thereof shall be cancelled.

Factual Matrix of *NAFED v. Alimenta*

The dispute arose due to the short-supply of groundnut to Alimenta SA, a Swiss firm in 1979-80 due to the destruction of the crop. NAFED, under a later addendum to the agreement, assured to ship the shortfall in 1980-81. However, due to the prohibitions imposed by the Indian government and on account of then-existing export rules, NAFED was not able to export HPS groundnuts to Alimenta, as originally intended in the said addendum.

This further led to the invocation of arbitration proceedings by Alimenta before the FOSFA, headquartered at London, UK. The same was challenged by NAFED before the Delhi High Court. NAFED prayed to restraint Alimenta and FOSFA from continuing the arbitration proceedings. The High Court stayed the arbitration proceedings and ultimately, it was held that the agreement between the parties would be governed by the existing arbitration agreement. The same view was upheld by the Supreme Court.

Thereafter, an award was passed by FOSFA and NAFED was directed to pay Alimenta a sum of USD4,681,000 with 10.5% interest per annum from 13-02-1981 till the date of the award. This award was enhanced in an appeal before the Board of Appeal. After multiple rounds of litigation, the award was held to be enforceable by the Delhi High Court and the execution of the said award was challenged by NAFED before the Supreme Court in the present case.

CONTENTIONS OF PARTIES

Learned senior advocate, Mr. Shyam Diwan and the learned senior counsel, Mr. Rana Mukherjee vehemently contended on behalf of NAFED that the enforcement of the said award is barred by Section 7(1) (a) (iii) of the Foreign Awards (Recognition and Enforcement) Act, 1961. It was further contended that since the award does not deal with the restriction imposed by GoI on the export of the commodity, the same is against the public policy of India and thus unenforceable under Section 7(1)(b) of the said Foreign Awards Act.

Learned senior counsel, Mr. C.A. Sundaram on behalf of Alimenta, *inter alia* contended that there is a limited scope of interference in the enforcement of the foreign award and the said award is not at all against the public policy of India. It was further contended that NAFED was given due opportunity and the issue of imposition of ban by the GoI was also dealt with by the Arbitral Tribunal. Thereafter, a conclusion was recorded by the Tribunal that it was a self-imposed restriction by NAFED.

JUDGMENT

The Hon'ble Court by placing its reliance on its earlier pronouncement in case of *Satyabrata Ghose v. Mugneeram Bangur & Co.* [6] which was also followed in *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* [7], considered the doctrine of frustration of contract and application of sections 32 and 56 of the Indian Contract Act, 1872. The Court observed that "impossibility" and "frustration" are the expressions that are used interchangeably. However, in India, the only doctrine that the courts have recognized and followed is the doctrine of intervening impossibility or illegality as enshrined under section 56 of the Indian Contract Act. The precedents of foreign courts in this regard may have persuasive value but the same is not binding on the Indian courts.

The Hon'ble Court further considered that any implied or express stipulation in a contract if it provides for the discharge of contract on account of the happening of any contingency then discharge or dissolution of the said contract would be as per the terms of the same contract mutually agreed between the parties. Such cases would fall outside the purview of section 56 of the Indian Contract Act and they have to be dealt with under section 32 of the Act.

Post-consideration of these points and several other precedents in this regard, the Hon'ble Supreme Court disregarded the observation of Delhi High Court that it was a case of self-induced frustration. The Hon'ble Court further opined that the present case is not a case of frustration under section 56 of the Indian Contract Act but considering prohibition clause i.e. clause 14 of the agreement it can be identified that the said stipulation was based upon the applicable Indian law and was further based on the export restrictions which are well within the realm of the public policy of India. The Court observed that government's permission for the export was necessary and NAFED being a canalising agency of GoI could not have supplied the HPS groundnuts without the prior permission, therefore, enforcement of such an award in violation of the government's order and policy would be against the public policy of India as envisaged in section 7 of the Foreign Awards Act, 1961.

In light of the aforesaid, the Hon'ble bench comprising of Justices Arun Mishra, M.R. Shah and B.R. Gavai held as hereunder:

"Resultantly, 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."

Consequently, the appeal filed by NAFED was allowed by the Hon'ble Supreme Court of India by setting aside the impugned judgment and orders passed by the Delhi High Court and thus the award in the present case was held to be unenforceable.

CONCLUDING REMARK- "THE CHASE CONTINUES"

The Hon'ble Court's judgment in the present case will set loose the unruly horse on a run. Several precedents have been set to restrain it. It is apparent from the foregoing judgment and observations that the grounds of "public policy" remain elusive, open-ended and therefore subject to multiple interpretations. There are no fixed parameters or guidelines for the application of public policy grounds particularly in the context of foreign awards. Therefore, it is high time for the Indian Parliament to step-in and permanently fix the blurring lines between the ever-expanding scope of interpretation of "public policy" and sparing use of the doctrinal considerations in order to harness the unruly horse.

- [1] [1824] 130 Eng. Rep. 294.
- [2] Id at pg.252.
- [3] Renusagar Power Co. Ltd. v. General Electric Co. AIR 1994 SC 860
- [4] 2019 SCC OnLine SC 177.
- [5] Civil Appeal No.667 of 2012.
- [6] AIR 1954 SC 44.
- [7] AIR 1968 SC 522.

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