

IN THE HIGH COURT OF DELHI AT NEW DELHI

EX.P. 57/2009 with E.A. No.253 of 2010

Reserved on: January 24, 2012

Decision on: February 13, 2012

AGRITRADE INTERNATIONAL PTE. LTD. ... Decree Holder
Through: Ms. V. Mohana, Advocate

versus

NATIONAL AGRICULTURAL CO-OPERATIVE
MARKETING FEDERATION OF INDIA LTD ... Judgment Debtor
Through: Mr. T.K. Ganju, Senior Advocate with
Mr. A.K. Thakur with
Mr. R.K. Mishra, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

13.02.2012

Introduction

1. Agritrade International Pte. Ltd. ('Agritrade') has filed the present petition under Sections 47, 48 and 49 of the Arbitration & Conciliation Act, 1996 ('Act') seeking enforcement of an Award dated 12th March 2007 and 14th January 2008 passed by the Arbitral Tribunal under the auspices of the Palm Oil Refiners Association of Malaysia ('PORAM') whereby the Respondent, National Agricultural Cooperative Marketing Federation of India Limited ('NAFED'), has been directed to pay Agritrade a sum of US Dollar ('USD') 580,000 together with interest at the rate of 8% from 7th October 2004 till the date of the Award and further interest at 8% from the date of the Award till the date of payment together with costs of arbitration as assessed by PORAM.

Background facts

2. Agritrade is engaged in the business of buying and selling crude palm oil ('CPO') in bulk in the international market. It is stated that the sale and purchase of CPO oil is usually concluded through brokers. It is the case of Agritrade that a contract dated 11th May 2004 was entered into between it and NAFED, concluded and issued through M/s. Global Commodities (M) Sdn. Bhd. of Kuala Lumpur, Malaysia ('Global Commodities'), whereby NAFED agreed to buy 5000 metric ton (MT) of CPO (in bulk) at the price of USD 541 per MT CIF Kolkata. According to Agritrade the shipment was to take place in May 2004 and payment was to be made by 100% irrevocable, unrestricted and confirmed Letter of Credit ('L/C') at site with TT reimbursement clause.

3. Agritrade states that the terms of the contract were to be in accordance with PORAM/FOFSA 81. Disputes arising out of the said contract were to be resolved in accordance with PORAM Rules of Arbitration and Appeal in force on the date of the contract. Agritrade states that in terms of the contract it nominated a vessel, MT Chem Adriatic/Sub with Laycan which was to sail between 18th and 23rd May 2004 through a broker, Global Commodities, on 12th May 2004. An L/C was to be established by NAFED within two days of the nomination of the said vessel, i.e., 14th May 2004. However, NAFED failed to do so.

4. Agritrade further claims that on 20th May 2004 it substituted the said vessel with MT Andreas III/Sub with Laycan which was to sail between 23rd May and 28th May 2004 and agreed to change the discharging port to Kandla at the request of NAFED. Again, despite reminders, NAFED failed to take steps to open the L/C. It is then claimed that on 24th May 2004 the representatives of Agritrade met the representatives of Earthtech

Enterprises Ltd. ('Earthtech') at New Delhi. It is stated that Earthtech was the agent of NAFED for performance of the contract. It is further stated that as a result of the said meeting, Earthtech agreed to open the L/C for CPO 6000 MT on behalf of NAFED in early shipment. It also agreed to open LC for the months of July, August and September 2004. However, the L/C was not established. Consequently, Agritrade wrote a letter dated 7th October 2004 declaring NAFED to be in breach of the contract. On 15th April 2005 Agritrade invoked the arbitration clause and appointed Mr. Lim Lee Hock as its Arbitrator. However, NAFED failed to appoint its Arbitrator even after a request in this behalf was made by PORAM. Consequently, the Chairman of PORAM nominated Mr. P.R. Thakore on behalf of NAFED as Arbitrator and Mr. Tan Boon Kenj was appointed as the Umpire. The said arrangement was communicated to the parties by PORAM by letter dated 5th July 2005.

Proceedings before the Arbitral Tribunal

5. On 18th July 2005, Agritrade submitted its claim petition to PORAM. This was forwarded to NAFED on 26th July 2005 and it was required to file its statement of defence. A defence statement was filed by NAFED on 5th August 2005 to which a reply was filed by Agritrade on 9th November 2005. NAFED filed an Additional Statement of Defence on 23rd November 2005. In its defence, NAFED raised a preliminary objection to the maintainability of the arbitral proceedings. It challenged the existence and validity of the contract dated 11th May 2004 and thereby the arbitration agreement as well as the jurisdiction of the Arbitral Tribunal. It is stated that despite taking extensions, NAFED did not appear at the oral hearings.

6. On 2nd February 2006 Mr. Satinder Kapur on behalf of NAFED sought

participation on behalf of NAFED at the oral hearing scheduled for 10th February 2006 limited to the question of jurisdiction of PORAM and without prejudice to NAFED's stand that there was no valid and concluded contract between the parties. On 6th February 2006 the date of the oral hearing was postponed to 3rd March 2006 and on 10th February 2006 NAFED was advised by the Arbitral Tribunal that Mr. Satinder Kapur was not permitted to attend the oral hearing on 3rd March 2006 as under the PORAM Rules no practicing lawyer was permitted to attend any oral hearing.

7. The preliminary objections of NAFED were rejected by the Arbitral Tribunal by an interim Award dated 12th March 2007 by holding that a "Sales Contract" dated 11th May 2004 exists and that NAFED was the buyer as per the Sales Contract. Further, it ruled that it had the jurisdiction to award on the preliminary issue.

8. Agritrade, by a letter dated 15th March 2007, requested the Arbitral Tribunal to adjudicate the issues on merits. Even in the subsequent proceedings, NAFED did not submit its statement of defence. Thereafter, the Arbitral Tribunal proceeded to pass the final Award on 14th January 2008 in the absence of NAFED and issued directions as mentioned hereinbefore.

9. Agritrade issued a letter of demand on 18th March 2008 to NAFED requiring it to pay the sum awarded by the Arbitral Tribunal. Thereafter, the present petition was filed on 24th February 2009 under Sections 47, 48 and 49 of the Act for enforcement of the Arbitral Tribunal's Award dated 14th January 2008.

Agritrade's case for enforcement

10. On 30th March 2009, while directing notice to issue in the petition, this Court noted that “no arbitration agreement between the parties has been filed on record.” Agritrade was granted permission to file additional documents within four weeks.

11. Agritrade filed an affidavit dated 20th August 2009 of Martin Charles, a Director of Global Commodities, who claimed that the contract was concluded on 11th May 2004 between Agritrade and NAFED “through co-broker, Mr. Kiran Shah, who represented the buyer, NAFED.” He claimed to have sent a fax message to one Ms. Linda on that date *inter alia* asking her “to ask Agritrade to prepare the contract and we fax to NAFED New Delhi office and to follow up on the L/C.” He further gave the details of five earlier contracts with NAFED through Global Commodities and claimed that “the way in which the contract in question was formed is similar to the 5 contracts referred to. They all prove that Kiran Shah was representing NAFED and even though Earthtech is mentioned, the contract was undeniably concluded between Agritrade and NAFED.” The documents referred to in the affidavit were enclosed with it. Additionally, on 10th January 2010, Agritrade filed an additional set of documents.

NAFED's objections

12. NAFED filed its objections to the enforcement of the Award by filing E.A. No. 253 of 2010 in which it pointed out that under Section 47 of the Act, a party applying for enforcement of a foreign Award shall at the time of filing such application produce before the Court, *inter alia*, the original arbitration agreement or a certified copy thereof. Inasmuch as no such agreement existed between the parties as was evident from the document dated 11th May 2004, the execution petition was liable to be dismissed

with exemplary costs on this short ground. It was specifically urged in para 3 of the objections that: “the agreement on the basis of which the Award was given never came into existence at any point of time either directly or through any broker, there is not a single document or other evidence to show that NAFED had at any point of time expressed an intention to enter into such transaction with Agritrade International.” Invoking Section 48 (1) (b) of the Act it was submitted that NAFED was not given proper notice of the appointment of an Arbitrator. The Arbitral Tribunal was constituted unilaterally by PORAM at the behest of Agritrade. Further, sufficient opportunity was not given to NAFED to present its defence before the Arbitral Tribunal since its lawyer was not permitted to appear. It was submitted that enforcement of the Award should be refused in terms of Section 48 (2) (b) of the Act because such enforcement would be contrary to the public policy of India.

13. In its objections, NAFED responded to the affidavit dated 20th August 2009 of Mr. Martin Charles and stated that it did not know anything about Global Commodities or Mr. Martin Charles and that “there is no correspondence exchanged between Mr. Martin Charles and Global Commodities in respect of the transaction in question at any point of time.” It was further stated that “Kiran Shah is not a broker of NAFED nor had NAFED given any authorization in favor of Kiran Shah to deal on behalf of NAFED in any manner whatsoever.” There was no signature of the buyer on the document dated 11th May 2004. NAFED had neither negotiated any contract nor had received “the so-called contract dt.11.05.2004.” As regards the other contracts referred to in the affidavit of Mr. Martin Charles, it was pointed out that NAFED had opened an L/C in each of them and copies thereof were enclosed. Further, the documents

filed by Agritrade were “not in any manner related to the alleged transaction in question.”

14. As regards Earthtech while NAFED admitted to having entered into a Memorandum of Understanding (‘MoU’) with it, it stated that NAFED had filed a complaint with the CBI against Earthtech and its officers/directors which was pending investigation. In its rejoinder NAFED further pointed out that Earthtech had entered into an MoU with it on 16th October 2003 as read with an Addendum dated 12th February 2004 whereby Earthtech was to make arrangements for import of various commodities including CPO. They were to locate suppliers and then finalize the terms and conditions with those suppliers. In many cases, Earthtech had committed defaults and there were several cases pending against them in this Court, arbitral tribunals and criminal courts. As regards four other contracts it was pointed out that those contracts were duly executed and signed by the authorized representative of NAFED, which is a society registered under the Multi-State Cooperative Societies Act, 2002 and governed by its rules, regulations and bye-laws. It is categorically stated that NAFED does not and cannot enter into any agreement, business or trade without a contract having been signed by its duly authorized representative.

15. The submissions of Ms. V. Mohana, learned counsel on behalf of Agritrade and Mr. T.K. Ganju, learned Senior counsel on behalf of NAFED have been heard.

Consequences of not complying with Section 47 (1) (b)

16. The first issue concerns the non-compliance with Section 47 (1) (b) of the Act which requires a party applying for enforcement of a foreign

award to mandatorily produce before the Court “at the time of the application”, “the original agreement for arbitration or a duly certified copy thereof.” In ***Austbulk Shipping SDN BHD v. P.E.C. Ltd. (2005) 2 Arb LR 6 (Del)*** it was observed that an application for enforcement not accompanied by the arbitration agreement may be returned to the applicant for filing a fresh application and further that the failure to file the agreement was not one of the grounds set out under Section 48 of the Act for rejection of the prayer for enforcement. However, in the present case even that stage has been crossed. Even while issuing notice on 30th March 2009 it was noticed that Agritrade had not filed a copy of the arbitration agreement. Agritrade was given an opportunity to file additional documents. None of the documents filed by Agritrade include an ‘arbitration agreement’ between it and NAFED within the meaning of Section 7 of the Act. What is sought to be relied upon is a combination of documents beginning with the document dated 11th May 2004, which was neither addressed to nor signed by NAFED, and correspondence between Global Commodities and Agritrade to plead that there was an ‘implied’ agreement between the parties. For reasons to be discussed, the fact remains that there was in fact no arbitration agreement within the meaning of Section 7 of the Act. Consequently, the inescapable conclusion is that Section 47 (1) (b) of the Act had not been complied with.

17. It is not that there are no consequences for the failure of a party to file a copy of the arbitration agreement. Section 48 (2) (a) of the Act states that enforcement of an award may be refused if the Court finds that “the subject matter of the difference is not capable of settlement by arbitration under the law of India.” The question to be asked is whether in terms of the law of India, the dispute between Agritrade and NAFED, in the absence of an arbitration agreement, was capable of settlement by

arbitration? The obvious answer has to be in the negative. A reading of Sections 7 and 16 (1) of the Act show that the existence of an arbitration agreement is what confers jurisdiction on the arbitral tribunal. At the threshold where a party is able to demonstrate to the satisfaction of the arbitral tribunal under Section 16 (1) of the Act that an arbitration agreement does not exist or where it does it is not valid, that brings the arbitration proceedings to a close. Such dispute is therefore “not capable of settlement by arbitration” under Indian law in terms of Section 48 (2) (a) of the Act. This is therefore one ground on which the enforcement of the foreign Award in question can be refused in the instant case.

Was there a concluded contract and therefore an arbitration agreement between the parties?

18. Since NAFED at the threshold raised the defence of absence of a concluded contract with Agritrade and consequently the absence of an arbitration agreement, the Arbitral Tribunal dealt with the said preliminary issue in its interim Award dated 12th March 2007. A perusal of the said interim Award reveals that the Arbitral Tribunal first began by asking how it was possible that “the Buyers” requested for a change of discharge port, as evidenced by Agritrade’s telex to Global Commodities on 20th May 2004, if there was no contract? The said question was an erroneous one to pose given the fact that the said telex was not addressed to NAFED at all and therefore not to the “Buyers”. The Arbitral Tribunal then looked at another contract dated 20th December 2003 between NAFED and Wilmar where an L/C was opened. Still, it failed to notice that in the instant case in fact no L/C was opened by NAFED. The reason why it found that a contract existed was due to the two vessel nominations – that is first MT Chem Adriatic and its substitution by Audreas III due to change in discharge port. What was missed to be noticed by the Arbitral

Tribunal was the fact that there was not a single document produced by Agritrade to show that NAFED was a party to the above transactions. In fact no such document was produced by it even before this Court.

19. In ***Shakti Bhog Foods Ltd. v. Kola Shipping Ltd. (2009) 2 SCC 134*** the Supreme Court interpreted Section 7 of the Act and held (SCC, p. 142) that “the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement”. This was reiterated in ***Trimex International FZE Limited, Dubai v. Vedanta Aluminium Limited, India, (2010) 3 SCC 1***, where it was observed (SCC, p. 32): “It is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of telecommunication.” In the absence of a written signed contract between the parties, the burden was on Agritrade to show that there was nevertheless a concluded contract on the basis of other documents on record.

20. The documents produced by Agritrade in support of its plea that there existed a contract dated 11th May 2004 include a document titled “Sales Contract’ of that date which is shown to have been sent by fax to Global Commodities. There is nothing to show that the said document was sent by fax or any other means to NAFED. Also, the document produced bears no signature on behalf of NAFED in the space earmarked in the document for that purpose. Unless a contract, reduced to writing, is signed by both parties no such contract can come into existence. There is no contemporaneous document to show that there were written instructions

from NAFED to Global Commodities to buy the aforementioned quantity of 5000 MT of CPO from Agritrade.

21. The minutes of the meeting held on 24th May 2004 in the office of Earthtech shows no presence of anyone from NAFED. It shows the presence of one Mr. Kiran Shah. In fact, in the entire minutes, there is no mention of NAFED at all. It is difficult, therefore, to accept the plea of Agritrade that there were four contracts with NAFED for supply of 5000 MT of CPO. The minutes of the meeting of 24th May 2004 show that a total quantity of 6000 MT at USD 541 PMT and 10000 MT at USD 501 PMT, both at CIF Kandla. At one stage, this Court had granted Agritrade the liberty to file additional documents to substantiate its claim about there being a validly concluded contract with NAFED. The additional documents were filed but this still did not substantiate the claim of Agritrade. A further opportunity was granted on 19th September 2011 in response to which it has been stated by Agritrade in an affidavit dated 22nd November 2011 that the fax dated 7th October 2004 was sent not to NAFED by Agritrade, but to Global Commodities which was then further forwarded to Mr. Kiran Shah. Consequently, there is no document produced by Agritrade to show that it had any dealings with NAFED in relation to the contract dated 11th May 2004 for purchase of 5000 MT of CPO. Merely because there were earlier contracts with NAFED through Global Commodities cannot *ipso facto* mean that the present contract was, in fact, entered into with NAFED through Global Commodities Ltd. Particular to this contract, there has to be some contemporaneous evidence in the form of letters of confirmation either emanating from NAFED or sent to NAFED.

22. The documents filed with the affidavit of Mr. Martin Charles of

Global Commodities show that in four of the concluded contracts with NAFED in the year 2004 that were fulfilled “firm irrevocable letters of credit were issued” by NAFED’s bankers. It is not in dispute that as far as the present dispute is concerned no L/C was, in fact, opened by NAFED. The affidavit of Mr. Martin Charles of Global Commodities states that five contracts were entered into before and after the Agritrade contract where he was the broker for the sellers and Kiran Shah was the broker for NAFED. However, in para 9 of the affidavit he adds, “further despite Earthtech’s involvement, the letters of credit were opened by NAFED and invoice were issued to NAFED, clearly proving that the buyer is NAFED”. The absence of any L/C opened by NAFED in the present case is a clear indicator that in fact there was no concluded contract between it and Agritrade. The document dated 20th May 2004 whereby Global Commodities nominated a different vessel was also only sent to Mr. Charles Martin and not to NAFED. Further, there is merit in the contention on behalf of NAFED that it cannot be expected to enter into a contract without there being a document signed by its authorized representative.

23. Consequently, as far as the interim Award dated 12th March 2007 is concerned, the Arbitral Tribunal appears to have based its conclusion on the existence of a concluded contract dated 11th May 2004 on no evidence whatsoever. Mr. Kiran Shah, who was supposed to have acted on behalf of NAFED, was not produced or examined. The conclusion of the Arbitral Tribunal appears to be based on surmises and conjectures. Agritrade had failed to establish before the Tribunal that there was a firm contract dated 11th May 2004 with NAFED.

24. There is also merit in the submissions made on behalf of NAFED that there was no material produced before the Arbitral Tribunal by Agritrade to show that it had, in fact, suffered any loss as a result of NAFED not opening an L/C for the quantity of 5000 MT of CPO. In its final Award dated 14th January 2008, the Arbitral Tribunal merely accepted the default date as 7th October 2004 and proceeded to determine the “close out price” to assess the damage. Unless there was actual proof of loss suffered by Agritrade, awarding of any differential between the contracted price and close out price must also be held to be based on no evidence.

Conclusion

25. For the aforementioned reasons, this Court is of the considered view that the interim Award dated 12th March 2007 and the consequential final Award dated 14th January 2008 of the Arbitral Tribunal are based on no evidence. The enforcement of the final Award dated 14th January 2008 would be contrary to the public policy of India within the meaning of Section 48 (2) (b) of the Act. Enforcement is also declined, for the reasons already discussed, under Section 48 (2) (a) of the Act.

26. The petition is, accordingly, dismissed with costs of Rs.20,000/- which will be paid by Agritrade to NAFED within a period of four weeks.

S. MURALIDHAR, J.

FEBRUARY 13, 2012

s.pal