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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 30.11.2012**

% **FAO(OS) 572/2012**

M/s Cinergy Corporation PTE. Ltd. Appellant
Through: Mr. D.K. Agarwal, Senior Advocate
with Mr. Suryakant Singla and
Ms.Shagun Bhatnagar, Advocates
versus

M/s National Agricultural Co-operative Marketing Federation of India
Ltd. Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J.

C.M. No. 19921/2012 (exemption)

Exemption is allowed, subject to all just exceptions.

FAO(OS) No. 572/2012

1. The appellant by the present appeal seeks to assail the common order passed by the learned Single Judge in O.M.P. No. No. 389/2006 and 243/2008. The appellant- Cinergy Corporation PTE. Ltd. preferred a petition, being O.M.P. No. 389/2006, under Sections 47 and 48 of the Arbitration and Conciliation Act, 1996 (the Act) to seek enforcement of the Foreign First Tier Arbitration Award No. 3906 dated 11.04.2005 (the 'First

Tier Arbitration Award’) and Arbitration Appeal Award No. 927 dated 16.11.2005 (the ‘Appellate Award’) followed by the Final Foreign Arbitration Award dated 08.05. 2006 (the ‘Foreign Award’) wherein the appellant sought to realize the amount awarded in its favour against the respondent – National Agricultural Co-operative Marketing Federation of India Limited (‘NAFED’). Upon issuance of notice, in the said petition of the appellant, the respondent NAFED preferred objections under Section 48 of the Act, being O.M.P. No. 243/2008. By the impugned judgment, the learned Single Judge has allowed those objections of the respondent NAFED and concluded that there was no valid arbitration agreement subsisting between the parties within the meaning of Section 7 read with Section 47(1)(b) of the Act and, consequently, the First Tier Arbitration Award, the Appellate Award and the Foreign Award have been held to be not enforceable. The petition preferred by the appellant being O.M.P. No. 389/2006 has been dismissed with costs of Rs. 30,000/-.

2. It appears that on 16.09.2004, an email titled, “trade confirmation” was sent by one Global Commodities (M) SDN BHD (referred to as, “Global”) to the appellant purporting to confirm that the trade mentioned therein had been concluded, wherein Global acted as the broker. This trade purported to show the appellant as the Seller, and NAFED as the buyer in respect of 6000 M.T. of crude palm oil in bulk at a price of US\$ 440.00 PMT CIF Kandla, apart from the other terms. It stated that the payment is to be made by a ‘Letter of Credit’ (“L/C”) from 1st Class Indian Bank. This was followed by a message sent by one Earthtech

Enterprises Ltd. (Earthtech) to Global on 18.09.2004 purporting to confirm the transaction aforesaid.

3. On the basis of the aforesaid communications, the appellant contended that a concluded contract had come into being between itself and the respondent as contained in these documents. The appellant claimed that it required the respondent to establish the L/C through message sent to Global. Global advised the appellant on 11.10.2004 that respondent required time up to 15.10.2004 to consider it taking up the shipment or to wash out the contract. The appellant claims that on 15.10.2004, it placed the respondent in default for non-performance. Thereafter, the appellant sought reference of disputes to arbitration under the Federation of Oils, Seeds and Fats Associations Limited ('FOSFA') Rules.

4. The respondent claimed that Earthtech entered into negotiations for purchase of crude palm oil from the appellant through their broker Global without, in any manner, involving NAFED. NAFED had no notice of so called trade confirmation of 16.09.2004 or Earthtech's reply to Global on 18.09.2004. The respondent claimed that it received notice dated 16.09.2004 only on 19.10.2004 alleging default on its part. The respondent also claimed that upon it getting in touch with Earthtech on 09.11.2004, Earthtech addressed a communication dated 09.11.2004, through its counsel Mr. Parvinder Khatra to the appellant stating that, on coming to know of the identity of the Director of Cinergy, Earthtech had immediately and forthwith cancelled the said trade confirmation dated 18.09.2004 as they were not comfortable in having trade relations with him because of his past antecedents. Earthtech further stated in this communication:

“5. That from the correspondence received from your broker, it appears that you had put NAFED, India on final notice as per your letter dated 07.10.2004 whereas it is clear from the facts stated above that NAFED, India was not concerned and/or connected with the above matter. There was no question of taking your notice seriously and/or the contract seriously and/or establishing an operative L/C as no contract has been entered into neither between NAFED, India and yourself and nor between yourself and my clients.

6. That in the exchanged correspondence it has been nowhere stated by NAFED, India and/or my clients that they need some time upto 15th October, 2004 to consider taking up shipment or to washout the contract. It is pertinent to note that there is/was no contract in existence at any point of time regarding trade Reference No. G1297-04.

7. That my clients specifically state that as no contract has been concluded between yourselves and my clients hence there is no question of existence of an arbitration clause which may result in the initiation of any arbitration proceedings.”

(emphasis supplied)

5. Mr. Parvinder Khatra, while acting on behalf of the respondent, addressed a communication dated 29.11.2004 to the appellant, wherein it was stated as under:

“Dear Sirs,

My aforesaid clients have placed before me the correspondence exchanged between you and them and in particular your claim submissions and documents sent under date of 18th November 2004 with copies to FOSFA International, United Kingdom, Mr. Rob A Barber, United Kingdom and M/s. Global Commodities (M) Sdn. Bhd., Malaysia with instructions to address you as follows:

That from the supporting documents marked as 'Annex 1' to 'Annex 32' my clients have not been able to trace the alleged contract concluded between them and yourselves and which is alleged to have been lapsed or go into default regarding 6000 MT Crude Palm Oil in bulk CIF Kandla.

In the premises, I request you on behalf of my clients to make available to me the alleged original contract with 'NAFED' to enable us to proceed further. ”

6. On 07.01.2005, Earthtech issued another communication to NAFED which reads as follows:

“Dear Sir,

Subject: - FOSFA Arbitration initiated by Cinergy Corporation Pte. Ltd.

With reference to the above, kindly note that there is no contract or agreement in any form between NAFED and Cinergy Corporation Pte. Ltd.

For your information, a Trade agreement was signed by Earthtech Enterprises Limited with Cinergy Corporation Pte. Ltd. This did not materialize and is being contested by us directly and appropriately. A copy of the latest communicated dated 4th January 2005 from our legal counsel M/s Satinder Kapur & Associates to FOSFA International, United Kingdom is enclosed for your reference and advice.

We trust this clarifies the matter.” (emphasis supplied)

7. The First Tier Arbitral Tribunal on 11.01.2005 held on the basis of correspondence of 16.09.2004 that the sellers and the broker were firmly of the view that they were dealing with NAFED and that there was nothing

before them to say otherwise. The document dated 18.09.2004 was interpreted by the First Tier Arbitral Tribunal to mean that the contracting parties were the appellant and the respondent. The case of the respondent that the word, “A/c” occurring below the respondent’s name in the document dated 18.09.2004 meant that Earthtech was the principal, was rejected.

8. Aggrieved by the First Tier Arbitration Award dated 11.04.2005 which held that the respondent was a buyer of the appellant, the respondent preferred an appeal before the appellate board of FOSFA (the ‘Appellate Board’). The respondent contended that the contract, if at all, was between Earthtech and the appellant and not between the respondent and the appellant. However, the appellate board rejected the said appeal of the respondent. What weighed with the Appellate Board was that since the confirmation dated 18.09.2004 specifically described NAFED as the buyer, the addition of the words, “A/c Earthtech Enterprises”, relates to arrangement between Earthtech and NAFED – entirely extraneous and unknown to Cinergy.

9. The respondent then preferred proceedings before the High Court of Justice, Queen’s Bench Division (‘QBD’), Commercial Court and its application was dismissed on 23.06.2006.

10. The first objection raised by the respondent in its petition before the learned Single Judge that there was no arbitration agreement between the parties, as the respondent is not a party to the purported agreement dated 16.09.2004.

11. The Learned Single Judge, keeping in view the mandate of Section 47(1)(b) of the Act- which requires the person seeking enforcement of a foreign award to produce the arbitration agreement, has examined the aforesaid submission of the respondent.

12. The Learned Single Judge observed that since the two parties before the First Tier Arbitral Tribunal and the Appellate Board were the appellant and the respondent, the question that had to be addressed was: whether there was a written arbitration agreement between the parties.

13. In the absence of any such written agreement, taking note of the Section 5 of the English Arbitration Act, 1996 ('EAA')- which is no different in its essential features from Section 7 of the Act, the learned Single Judge observed that the question- whether an arbitration agreement could be inferred from any written exchange between the parties before it- still had to be addressed.

14. The learned Single Judge observed that there was absolutely no document placed on record to show an exchange of correspondence between the appellant and the respondent, wherein respondent accepted the existence of an agreement between it and the appellant. The trade confirmation dated 16.09.2004 was a document sent by the appellant's broker i.e. Global to the appellant, which was not addressed to the respondent at all. Learned Single Judge observed that the finding of the Appellate Board that the copy of the said document was received by the respondent on the same day as it was received by the appellant was based on no evidence and on an erroneous premise.

15. Referring to letters dated 29.11.2004 and 07.01.2005 as extracted above, the Learned Single Judge observed that, in fact, there was sufficient material on record to show that the appellant was told in no uncertain terms that no contract had been entered into by or on behalf of the respondent. There was no proof of the respondent being a party to any arbitration agreement with the appellant, which was the *sine qua non* for arbitration proceedings to have commenced. Neither the First Tier Arbitral Tribunal nor did the Appellate Board advert to the fundamental question as to existence of an arbitration agreement between the parties, and discuss the said correspondences.

16. Accordingly, Learned Single Judge concluded that there was no valid arbitration agreement between the appellant and the respondent within the meaning of Section 7 read with Section 47(1)(b) of the Act.

17. Aggrieved by the aforesaid order of the Learned Single Judge, the appellant herein has preferred the present appeal under Section 50 of the Act.

18. Learned Senior Counsel for the Appellant, Mr. Agarwal, submits that the respondent and Earthtech were acting together and on behalf of each other. By virtue of a Memo of Understanding ('MOU') dated 16.10.2003 and 12.02.2004 between the respondent and Earthtech, the respondent had to place purchase orders and open 'Letter of Credits' for the import of various commodities from foreign suppliers, on behalf of Earthtech, which were then to be sold to Earthtech by the respondent. The trade confirmation dated 16.09.2004 was a part of one such arrangement

between Earthtech and the respondent to purchase goods from the appellant. It is submitted that according to international practice, a binding contract could be concluded by a broker, and the present was an instance of such a contract. Mr. Agarwal therefore submits that there was a binding and concluded contract between the appellant and the respondent which, *inter alia*, contained an arbitration clause, namely “*PORAM/FOSFA 81 Rules*”.

19. It is further submitted that, from a perusal of the correspondences on record, it was proved that the documents pertaining to the trade confirmation were addressed to the respondent. The respondent, thereafter, never questioned the terms of the confirmation until the commencement of arbitration. Therefore, it did not lie in the mouth of the respondent to resile from and deny the existence of the contract and the arbitration agreement contained therein which stood concluded between the appellant and respondent herein.

20. Having perused the facts, records of the case, the impugned order and heard learned senior counsel for the appellant, we find no merit in the present appeal.

21. The “trade confirmation” dated 16.09.2004 and subsequent message dated 18.09.2004, on the basis of which the appellant claims to have entered into a concluded contract between itself and the respondent, were neither sent by or sent to the respondent herein. The trade confirmation dated 16.09.2004, as aforementioned, was sent by Global to the appellant. The said confirmation was never sent to the respondent, as rightly held by the learned Single Judge. There is absolutely no evidence on record to

suggest otherwise. The subsequent message dated 18.09.2004 also was sent by Earthtech to Global. A perusal of the correspondences, forming part of the pleadings before the Ld. Single Judge - also taken note of in the awards, reveals that up till the service of default notice dated 16.10.2004 by the appellant to the respondent, there was no communication whatsoever between the appellant and/or its broker 'Global' on the one hand, and the respondent, on the other.

22. The contention of the appellant and the findings in the First Tier Arbitration Award and the Appellate Award - that the aforesaid 'trade confirmations'/communications were within the knowledge of the respondent and entered on behalf of the respondent, have no basis whatsoever.

23. As already stated above, the trade confirmation dated 16.09.2004 was never sent to or received by the respondent. Further, there was no communication whatsoever from the appellant or its broker to the respondent or Earthtech up till the service of default notice. A perusal of the communications shows that from 18.09.2004 up till the service of default notice there were several exchanges between the appellant and its broker 'Global'. Pertinently, the said communications from the appellant to Global were marked with the words "*Please pass on to buyers- NAFED India, New Delhi*". No document has been placed on record to show that the contents of these communications were, in fact, passed on by Global to the respondent. Further, communications dated 06.10.2004 titled "*5th Reminder and NOTICE*" and dated 07.10.2004 "*6th Reminder and FINAL NOTICE*" from the appellant to Global were also marked with the words "*Please consider*

this as NOTICE to buyers” and “We hereby put buyers NAFED on FINAL NOTICE” respectively. Therefore, there was no occasion for the respondent to be in knowledge of the aforesaid ‘trade confirmations’/communications.

24. Further, after service of notice of default dated 16.10.2004, Earthtech sent a communication dated 09.11.2004, extracted hereinabove, to the appellant clarifying that the respondent had no concern with the said trade confirmation. Pertinently, the said communication also stated that the aforesaid trade offer dated 16.09.2004, which was confirmed by Earthtech on 18.09.2004, stood cancelled by Earthtech on 20.09.2004. The said aspect was later on clarified by the respondent itself to the appellant in its communication dated 29.04.2004, extracted above, where in it was stated that it could not trace any contract between itself and the appellant. Earthtech further fortified the said position in its communication dated 07.01.2005 addressed to the respondent, extracted above, wherein it was explained that the aforesaid trade agreement had been signed between itself and the appellant and that there was no contract or agreement in any form between the appellant and the respondent.

25. The First Tier Arbitration Award and the Appellate Award have no discussion of the said correspondences between the parties. No cogent reasons have been stated therein to hold that there was a concluded contract between the appellant and the respondent. They have mainly proceeded on the assumption that the trade transaction dated 16.09.2004, which recorded the name of the respondent as the buyer, was within the knowledge of the respondent and which were not disputed to, or protested by the respondent. There is no basis for the finding that the word “A/c Earthtech”, occurring in

the column of 'Buyer' along with the name of the respondent in Earthtech's confirmation dated 18.09.2004 meant that there was an arrangement between the respondent and Earthtech, and that the respondent was the principal to the contract.

26. Reliance placed by the appellant on the MOU entered into between the respondent and Earthtech, and the submission that the present transaction was in pursuance of such arrangement is entirely misplaced and has no merit whatsoever. As per the MOU, Earthtech was to finalise import of products and advise the same to the respondent along with its details. On receipt of the said details from Earthtech, the respondent was to sign the contract with the foreign supplier. In the present case, admittedly, no contract has been signed between the appellant and NAFED. The MOU does not authorize Earthtech to enter into a contract for and on behalf of NAFED. In the absence of any such contract having been entered into between the appellant and the respondent, coupled with the afore-stated discussion on the aforementioned communications, the present trade transaction cannot be said to have been entered into by the respondent.

27. For the aforementioned reasons, we find no infirmity with the order of the Ld. Single Judge and, accordingly, dismiss the present appeal.

VIPIN SANGHI, J.

SANJAY KISHAN KAUL, J.

NOVEMBER 30, 2012

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