

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 05.12.2016

+ **EX.P. 149/2015 & EA(OS) No.66/2016**

VIRGOZ OILS & FATS PTE LTD.

..... Decree Holder

Versus

**NATIONAL AGRICULTURAL CO- OPERATIVE
MARKETING FEDERATION OF INDIA
LTD.**

..... Judgement Debtor

Advocates who appeared in this case:

For the Decree Holder : Mr Mahfooz Nazki, Mr Kumar Visalaksh and
Mr Rohan Dhiman.

For the Judgment Debtor : Mr A.K. Thakur and Mr R.K. Mishra.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. Virgoz Oils & Fats Pte Ltd. (hereafter 'Virgoz') - a company incorporated under the laws of Singapore - has filed the present petition to enforce a foreign award dated 05.04.2012 (hereafter 'the award') published by an Arbitral Tribunal constituted under the Palm Oil Refiners Association of Malaysia Rules of Arbitration and Appeal, 2005 (hereafter 'the PORAM Rules'). The award was rendered in respect of the claims made by Virgoz against the respondent (hereafter 'NAFED').

2. NAFED has filed its objections - EA(OS) 66/2016 - to the above captioned petition praying that the enforcement of the foreign award be

refused under Section 48 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act').

3. Virgoz claims to have entered into three separate contracts - titled as Sales Contract Nos. SG/08/0437/06B01, SG/08/0442/06B01 and SG/08/0445/06B01 - for sale of a total of 4500 metric tonnes of crude palm oil (edible grade) to NAFED (hereafter referred to as 'the Contracts'). The Contracts, except as to the quantity of Palm Oil, are similarly worded.

4. NAFED disputes the existence of the Contracts and claims that the bargain between the parties was never finalised so as to fructify into a binding contract between the parties. The award has been rendered pursuant to Virgoz invoking the arbitration clause in the Contracts. Thus the principal question to be addressed is whether an arbitration agreement existed between the parties.

5. Virgoz had based its claims on the terms and conditions of the Contracts. The Contracts are a form of communications addressed to NAFED, which Virgoz claims embodies the agreement between the parties for sale and purchase of an aggregate of 4500 metric tonnes of palm oil. In terms of the Contracts, the shipment was to be made in August, 2008 and the payment was agreed to be made by irrevocable letter of credit (L/C).

6. The Contracts are signed by Virgoz as well as Ashok Bansal and Co. (broker) but are not signed on behalf of NAFED.

7. On 29.07.2008, NAFED sent a letter to Ashok Bansal and Co. (hereafter 'the Broker'), *inter alia*, with a request that certain shipments (including in reference to the Contracts) be deferred by the sellers from August to September, 2008. Virgoz claims that on 13.08.2008, it sent an

email to the Broker agreeing to defer the shipment to September, 2008 and also issued amended contracts. All the terms as recorded in the amended sales contracts (hereafter 'the Amended Contracts') are identical to the Contracts except that the shipment period is reflected as September, 2008. It is claimed that thereafter Virgoz nominated the vessel "MT PROCESS" with a laycan of 5th to 11th September, 2008 to lift the cargo. Thereafter, Virgoz claims that it sent a letter on 02.09.2008 to NAFED through the Broker pointing out that despite the nomination of vessel, NAFED had failed to establish the L/C and further requesting NAFED to open the L/Cs. Virgoz further claims that it made repeated requests to NAFED to establish L/Cs but, NAFED did not do so and, consequently on 23.09.2008, Virgoz declared NAFED to be in default. The vessel MT PROCESS arrived at Kandla Port on 30.09.2008.

8. On the basis of the aforesaid, Virgoz made a claim of the difference between the contract price and market price of palm oil to be supplied under the Contracts, as well as demurrages. The same was disputed and, therefore, Virgoz invoked the arbitration clause under PORAM Rules in accordance with the arbitration clause contained in the Contracts.

9. Virgoz nominated its arbitrator, but NAFED did not do so. Accordingly, the acting Chairman of PORAM appointed an arbitrator and the arbitrators so appointed, appointed the third arbitrator. Thereafter, the arbitrator appointed by acting Chairman of PORAM withdrew from the arbitration and was substituted by the acting Chairman of PORAM with another arbitrator.

10. Virgoz made the following claims, before the Arbitral Tribunal as constituted above:-

- "i) The difference between the contract price and the market price in respect of contract SG/08/0437/06B01 amounting to USD750,000.00.
- ii) The difference between the contract price and the market price in respect of contract SG/08/0442/06B01 amounting to USD470,000.00.
- iii) The difference between the contract price and the market price in respect of contract SG/08/0445/06B01 amounting to USD910,000.00.
- iv) Demurrage Incurred by "MT PROCESS" V.42 at Kandla port on pro-rata basis amounting to USD35,554.45.
- v) Financing and interest loss at the rate of 18% p.a. from the date of default till the date of settlement.
- vi) The cost of this arbitration."

11. NAFED filed its statement of defence, *inter alia*, stating that the bargains between the parties were not finalised. According to NAFED, draft sale contracts were forwarded to it through the Broker; however, they were never accepted and no acceptance for the same was communicated by NAFED. NAFED further asserted that the Contracts were only at a preliminary stage of negotiation through the Broker and no conclusive final agreement was arrived at between the parties and the Contracts remained un- signed.

12. The Arbitral Tribunal rejected NAFED's contention that the Contracts were not in existence. It held that the dealings between the parties proved otherwise. The Arbitral Tribunal found that the letter dated 29.07.2008 presented the "strongest evidence" of the Contracts being in existence. The Arbitral Tribunal also accepted the Broker's testimony that

"having contracts unsigned was the usual trade practice between parties trading palm oil in India at the time". Accordingly, the Arbitral Tribunal awarded the claims in favour of Virgoz.

Submissions

13. Mr Nazki, learned counsel appearing for Virgoz submitted that the award ought to be recognized as a foreign award and enforced in accordance with Part II of the Act. He submitted that the existence of the Contracts between the parties could not be denied. He contended that the parties were dealing through the Broker and there was no necessity that the Contracts be separately signed by NAFED. Mr Nazki further submitted that the Contracts, *albeit* unsigned by NAFED, contained an arbitration clause and, therefore, the arbitration agreement between the parties could also not be denied. He further relied upon the letter dated 29.07.2008 addressed by NAFED to the Broker and contended that the said letter clearly indicated that NAFED had accepted the Contracts as NAFED had specifically referred to the Contracts and requested for deferment of the shipment.

14. Mr Thakur, learned counsel appearing for NAFED countered the aforesaid submissions. He pointed out that there was no communication directly between NAFED and Virgoz. He further submitted that the Arbitral Tribunal's finding that it was the usual practice to trade palm oil in India on the basis of an unsigned contract was wholly perverse and unsustainable. He further relied upon the decisions of this Court in **Agritrade International Pte. Ltd. v. National Agricultural Co-Operative Marketing Federation of India Ltd**: 187(2012) DLT 510, and **Cinergy Corporation Pte. Ltd. v. National Agricultural Co-Operative Marketing**

Federation of India Ltd: 194 (2012) DLT 65 in support of his contention that there was no agreement between the parties. He emphasized that the aforesaid decisions were rendered in cases, which were similar in all material aspects.

Reasons and conclusion

15. Part II of the Act contains provisions for enforcement of foreign awards. Section 44 of the Act defines the expression 'foreign award' and reads as under:-

"44. Definition.—In this Chapter, unless the context otherwise requires, “foreign award” means an arbitral award on differences between persons arising out of legal relationships, where contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

16. It is apparent from the plain language of Section 44 (a) of the Act that in order to recognize an award as a foreign award, it is necessary for the same to have been rendered in respect of differences between the persons arising out of legal relationships in pursuance of *an agreement in writing* for arbitration to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (specified in the first schedule to the Act and also known as the New York Convention) applies.

17. Paragraph 2 of Article II of the New York Convention is relevant and reads as under:-

“2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

18. It is amply clear from paragraph 2 of Article II of the New York Convention that an agreement in writing would include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in exchange of letters or telegrams. It is not Virgoz's case that the arbitration agreement between Virgoz and NAFED is contained in any exchange of letters or telegrams; Virgoz relies upon the arbitration clause as included in documents (the Contracts) which Virgoz asserts are the contracts between the parties. The Contracts clearly indicates that the same have not been signed by NAFED. Although, NAFED has been described as a buyer and a place for the signatures of the buyer is spherically provided, however, no signatures of the buyer appear at the designated place (or anywhere else in the document). The contention that the broker had signed the Contracts on behalf of NAFED also cannot be accepted as the Contracts clearly indicate that the Broker signed the Contracts in his own capacity and not for and on behalf of NAFED.

19. Although it is well settled that an arbitration agreement can also be entered into between the parties by exchange of letters, telegrams or emails; however, in the present case, there is no correspondence between NAFED and Virgoz, which would establish a meeting of minds and an agreement on the part of NAFED to refer any dispute to arbitration. It is noteworthy that the only letter of NAFED which is relied upon by Virgoz

is a letter dated 29.07.2008 to indicate NAFED's acceptance of the Contracts. This letter has been considered as "the strongest evidence" of the existence of the Contracts between NAFED and Virgoz. However, a plain reading of the said letter also does not indicate that NAFED had accepted or had agreed to be bound by the Contracts. NAFED has merely requested the Broker to take up the matter with the sellers (Virgoz and M/s Kalmart System) for deferment of shipments. The said letter does not in any manner militate against NAFED's contention that bargains between the parties had not been finalized. More importantly, the letter is not addressed to Virgoz and there is no document to indicate that the Broker was authorised to act for and on behalf of NAFED. There is no communication between Virgoz and NAFED, which would even remotely suggest that NAFED had agreed to be bound by the terms and conditions stipulated in the Contracts.

20. As stated earlier, the Contracts in question have not been signed by NAFED although the Contracts are addressed to NAFED. There is no communication emanating from NAFED which has been brought to the notice of this Court which would indicate that it had unequivocally conveyed its acceptance to the terms and conditions as set out in the Contracts.

21. Undisputedly, an arbitration agreement must be in writing; it must unequivocally indicate the intention of the parties to resolve their disputes by arbitration; it must be "signed by the parties or must be contained in exchange of letters or telegrams".

22. Although, Part I of the Act is not applicable, nonetheless, the provisions of Section 7 of the Act can also be referred to for the purposes

of considering the scope of the expression an "agreement in writing". Section 7(4) of the Act expressly provides that an agreement is in writing if it is contained in (a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

23. The scope of an arbitration agreement under Section 7(4) of the Act is somewhat wider than in paragraph 2 of Article II of the New York Convention. However, even applying the wider definition it would not be possible for this Court to accept the existence of an arbitration agreement between Virgoz and NAFED.

24. A similar controversy was considered by a Coordinate Bench of this Court in **Kalmart Systems (M) SDN BHD v. National Agricultural Co-operative Marketing Federation of India Ltd.**: 219 (2015) DLT 59, where after considering the said issues, this Court concluded that "*no concluded contract came into existence and, therefore, by logical corollary, one could safely say that there was no binding arbitration agreement subsisting between the parties*". Mr Nazki had fairly conceded that the facts in the above case are almost identical to the facts of the present case; the only distinguishing feature being that in the present case, Virgoz had shipped Palm oil to India and, therefore, had also claimed demurrages. In my view, the same would be of no relevance since the question whether there was any contract in existence is not dependent on whether Virgoz had shipped the Palm oil to India.

25. It is also relevant to note that in terms of the Contracts as set up by Virgoz, NAFED was obliged to establish the LC at least 10 days prior to the expected time of arrival of the nominated vessel at Loadport. The relevant clause of the Contracts is set out below:

"LETTER OF CREDIT TO BE ESTABLISHED LATEST 10 DAYS PRIOR TO THE ETA OF THE NOMINATED VESSEL AT LOADPORT DECLARED BY THE SELLER IN FULL OPERATIVE TELEX OR SWIFT. IF LETTER OF CREDIT IS NOT RECEIVED BY SELLER AS MENTIONED ABOVE, BUYERS IS DEEMED TO HAVE DEFAULTED ON THIS CONTRACT AND SELLER HAS THE OPTION TO DECLARE THIS CONTRACT NULL AND VOID AND CLAIM ANY PRICE DIFFERENCE OF LOSSES INCURRED FROM BUYER."

26. Admittedly, NAFED had not established any L/C and, thus, even as per the Contracts set up by Virgoz, there was no obligation on the part of Virgoz to ship the palm oil.

27. In ***Agritrade International Pte. Ltd. v. National Agricultural Co-Operative Marketing Federation of India Ltd.*** (*supra*), a coordinate Bench of this Court had rejected a petition to enforce a foreign award as the court concluded that it is a mandatory requirement that a petition under Section 47 of the Act be accompanied by filing "*the original agreement for arbitration or a duly certified copy thereof*". The Court further declined to read in an arbitration agreement from the combination of the documents produced before the Court. A similar view was expressed by a Coordinate Bench of this Court in ***Cinergy Corporation Pte. Ltd. v. National Agricultural Co-Operative Marketing Federation of India Ltd.*** (*supra*).

28. In view of the above, the objection filed by NAFED under Section 48 of the Act (EA(OS) 66/2016) is allowed. Accordingly, this Court declines to enforce the award. The petition (Ex. P. 149/2015) is, consequently, dismissed.

VIBHU BAKHRU, J

**DECEMBER 05, 2016
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