

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 22ND DAY OF APRIL 2021

THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

O.A. No. 645 OF 2019
and
A.Nos. 5727 to 5730 of 2019
in
C.S. No.407 of 2019

GEM Edible Oil Private Limited,
Rep. by its Managing Director,
Mr.K.M.Chinnadurai,
491 & 492, Kovai Road,
Kareagounderpalayam Village,
Kariyampalayam (PO),
Annur, Coimbatore – 641 653,
Tamil Nadu.

... Plaintiff / Applicant in
O.A. No. 645 OF 2019

Vs.

- 1.ADM International Sarl
260 – 262 & 45 – 45A,
Belur Industrial Area,
Dharwad – 580 011,
Karnataka, India,
Also at:
C/o.A One Business Centre,
La Piece 3,
CH – 1180 Rolle – Switzerland.
Email: oiltradingindia@adm.com
- 2.Federation of Oil Seeds & Fats Association
4-6 Throgmorton Avenue,
London, EC2N 2DL,
United Kingdom.
Email: fosfa.arbitration@fosfa.org

Liaising office for India;
 Indian Oilseeds & Produce Export Promotion Council
 78 – 79, Bajaj Bhavan
 Nariman Point
 Mumbai – 400 2021.
 Email: info@iopea.org

3.M/s.Bromex Pvt. Ltd.
 Registered office at 14-A,
 College Road,
 Chennai – 600 006.
 Tamil Nadu, India
 Email: bromex4@gmail.com

... Defendants / Respondents
 in O.A. No. 645 OF 2019

O.A. No. 645 OF 2019:

Original Application praying that this Hon'ble Court be pleased to pass an order of interim injunction restraining the respondents 1 and 2/defendants 1 and 2 from proceedings initiated by the first respondent in FOSFA Case No.778 on the file of the second respondent pending disposal of the above suit.

A.Nos. 5727 to 5730 of 2019:-

ADM International Sarl,
 A One Business Centre,
 La Piece 3,
 CH – 1180 Rolle - Switzerland

...Applicant
 (in all Applications)

vs.

1.GEM Edible Oils Private Limited,

Rep. by its Managing Director,
Mr.K.M.Chinnadurai,
491 & 492, Kovai Road,
Kareagounderpalayam Village,
Kariyampalayam (PO),
Annur, Coimbatore – 641 653,
Tamil Nadu.

2.Federation of Oil Seeds & Fats Association
4-6 Throgmorton Avenue,
London, EC2N 2DL,
United Kingdom.

3.Bromex Pvt. Ltd.
14-A, College Road,
Chennai – 600 006.
Tamil Nadu.

... Respondents
(in all Applications)

A.No. 5727 of 2019:

Application praying that this Hon'ble Court be pleased to refer the matter herein back to arbitration in terms of Clause 29 of the FOSFA Form 54 read with the Arbitration Clause of the Contracts bearing No.507603 dated May 16, 2019; 507841 dated July 02, 2018; 507843 dated July 02, 2018, 507917 dated July 16, 2018; 507921 dated July 16, 2018; 507925 dated July 16, 2018; 50946 dated September 07, 2018; 58361 dated October 19, 2018 and 508362 dated October 19, 2018 entered into between the Applicant/Defendant No.1 and Respondent No.1/Plaintiff in accordance with Section 45 of the Arbitration and Conciliation Act,1996 and to consequently dismiss the suit.

A.No. 5728 of 2019:

Application praying that this Hon'ble Court be pleased to vacate the interim injunction dated July 05, 2019 granted by this Honb'le Court in Appln.No.645 of 2019 and to dismiss Application No. 645 of 2019.

A.No. 5729 of 2019:

Application praying that this Hon'ble Court be pleased to revoke the leave granted in A.No.4516 of 2019 to institute C.S.No.407 of 2019.

A.No. 5730 of 2019:

Application praying that this Hon'ble Court be pleased to reject the plaint filed by the Respondent No.1/Plaintiff in C.S.No.407 of 2019 as not maintainable including for want of jurisdiction.

These applications having been heard on 24/02/2021 in the presence of Mr. P.H.Arvinth Pandian, Senior Counsel for Mr.S.Santhosh, Advocate for the Applicant in O.A. No. 645 OF 2019 and for the 1st respondent in A.Nos. 5727 to 5730 of 2019 and Mr. Nakul Dewan, Senior Counsel for Mr.Anirudh Krishnan, Advocate for the 1st respondent in O.A.No. 645 of 2019 and for the applicant in A.Nos.5727 to 5730 of 2019 and upon reading the order herein dated 14/11/2019 and having stood over for consideration

till this date and coming on this day before this court for orders in the presence of said advocates for the parties hereto and this court having observed that the respective plaintiff has failed to make out a case for an anti-arbitration injunction and that this court does not have jurisdiction and that this court does not propose to interfere with the arbitral process, in this court view, the stature and prestige of the Indian judicial system is enhanced by consistently enforcing the rule of law and, by contrast, is undermined if linguistic impulses hold sway or one-upmanship is indulged in, and although ADM has made out a case in the application under Section 45 of the Arbitration Act, it is not necessary to refer the parties for arbitration because arbitral proceedings have already culminated in a first partial award, it is ordered as follows:

That the interim order granted in pursuance of the order dated 05.07.2019 made in O.A. No.645 of 2019 in C.S. No. 407 of 2019, restraining the 2nd respondent therein from proceeding with the Arbitration cases, be and is hereby vacated.

2)That the leave granted in Application No. 4516 of 2019 to institute C.S. No.407 of 2019 ,be and is hereby revoked.

3)That the A.No. 5727 of 2019, to refer the parties to arbitration is disposed of subject to the observations and conclusions contained herein.

4) That the O.A.No. 645 of 2019, be and is hereby dismissed.

5) That the A.No. 5730 of 2019 in C.S.No.407 of 2019 do stand closed.

6) That there shall be no order as to costs.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE
22ND DAY OF APRIL 2021.

Sd/-

ASSISTANT REGISTRAR (O.S. II)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.

EVK

21/05/2021

O.A. No. 645 OF 2019
and
A.Nos. 5727 to 5730 of 2019
in
C.S. No.407 of 2019

ORDER

DATED : 22.04.2021

THE HON'BLE MR.JUSTICE
SENTHILKUMAR RAMAMOORTHY

FOR APPROVAL: 27/07/2021

APPROVED ON: 28/07/2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	24.02.2021
Judgment pronounced on	22.04.2021

CORAM

**THE HON'BLE MR. JUSTICE SENTHILKUMAR
RAMAMOORTHY**

**Application Nos.5723 to 5730 of 2019
and O.A.Nos.644 and 645 of 2019
in
C.S.Nos.406 and 407 of 2019**

ADM International Sarl
A One Business Centre,
L Piece 3,
CH – 1180 Rolle – Switzerland.
Also at
260 – 262 & 45 – 45A,
Belur Industrial Area,
Dharwad – 580 011,
Karnataka, India, ...Applicant
(in all Applications)

vs.

1.Sunraja Oil Industries Private Limited
Rep. by its Managing Director
Mr.K.Gandhi Rajan
Having its registered office at
Puliyankadu, Moolakkarai,
Perundurai Road,
Nasiyanur (Post),
Erode – 638 107.

2.Federation of Oil Seeds & Fats Association

4-6 Throgmorton Avenue,
London, EC2N 2DL,
United Kingdom.

3.Bromex Pvt. Ltd.

14-A, College Road,
Chennai – 600 006.
Tamil Nadu.

... Respondents
(in A.Nos.5723 to 5726 of 2019)

1.GEM Edible Oils Private Limited,

Rep. by its Managing Director,
Mr.K.M.Chinnadurai,
491 & 492, Kovai Road,
Kareagounderpalaya Village,
Kariyampalayam (PO),
Annur, Coimbatore – 641 653,
Tamil Nadu.

2.Federation of Oil Seeds & Fats Association

4-6 Throgmorton Avenue,
London, EC2N 2DL,
United Kingdom.

3.Bromex Pvt. Ltd.

14-A, College Road,
Chennai – 600 006.
Tamil Nadu.

... Respondents
(in A.Nos.5727 to 5730 of 2019)

O.A.Nos.644 and 645 of 2019

Sunraja Oil Industries Private Limited

Rep. by its Managing Director

Mr.K.Gandhi Rajan

Having its registered office at

Puliyankadu, Moolakkarai,

Perundurai Road,

Nasiyanur (Post),

Erode – 638 107

... Applicant
(in O.A.No.644 of 2019)

GEM Edible Oils Private Limited,

Rep. by its Managing Director,

Mr.K.M.Chinnadurai,
491 & 492, Kovai Road,
Kareagounderpalaya Village,
Kariyampalayam (PO),
Annur, Coimbatore – 641 653,
Tamil Nadu.

... Applicant
(in O.A.No.645 of 2019)

vs.

1.ADM International Sarl
260 – 262 & 45 – 45A,
Belur Industrial Area,
Dharwad – 580 011,
Karnataka, India,
Also at:
C/o.A One Business Centre,
L Piece 3,
CH – 1180 Rolle – Switzerland.

2.Federation of Oil Seeds & Fats Association
4-6 Throgmorton Avenue,
London, EC2N 2DL,
United Kingdom.

3.M/s.Bromex Pvt. Ltd.
14-A, College Road,
Chennai – 600 006.
Tamil Nadu.

... Respondents
(in both Original Applications)

PRAYER IN A.NO.5723 OF 2019: This Application is filed under Order XIV Rules 8 of the O.S. Rules r/w Section 45 of the Arbitration and Conciliation Act, 1998 to refer the matter herein back to arbitration in terms of Clause 29 of the FOSFA Form 54 read with the Arbitration Clause of the

Contracts bearing No.507840 dated July 02, 2019; 507842 dated July 02, 2018; 507916 dated July 16, 2018, 507920 dated July 16, 2018; 507924 dated July 16, 2018; 508151 dated September 07, 2019; 508329 dated October 17, 2018; 508154 dated September 07, 2018; 508330 dated October 17, 2018 and 508155 dated September 07, 2018 entered into between the Applicant/Defendant No.1 and Respondent No.1/Plaintiff in accordance with Section 45 of the Arbitration and Conciliation Act,1996.

PRAYER IN A.NO.5724 OF 2019: This Application is filed under Order XIV Rules 8 of the O.S. Rules r/w Order 39 Rule 4 of the Civil Procedure Code 1908 to vacate the interim injunction dated 05.07.2019 granted by this Court in O.A.No.644 of 2019 and to dismiss the same.

PRAYER IN A.NO.5725 OF 2019: This Application is filed under Order XIV Rules 8 of the O.S. Rules and Order III Rule 1 of the O.S. Rules r/w Clause 12 of the Letters Patent to revoke the leave granted in A.No.4515 of 2019 to institute C.S.No.406 of 2019.

PRAYER IN A.NO.5726 OF 2019: This Application is filed under Order XIV Rules 8 of the O.S. Rules r/w Order VII Rule 11 of the Civil Procedure Code, 1908 to reject the plaint filed by the Respondent No.1/Plaintiff in C.S.No.406 of 2019 as not maintainable including for want of jurisdiction.

PRAYER IN A.NO.5727 OF 2019: This Application is filed under Order XIV Rules 8 of the O.S. Rules r/w Section 45 of the Arbitration and

Conciliation Act,1996 to refer the matter herein back to arbitration in terms of Clause 29 of the FOSFA Form 54 read with the Arbitration Clause of the Contracts bearing No.507603 dated July 02, 2019; 507841 dated July 02, 2018; 507843 dated July 16, 2018, 507917 dated July 16, 2018; 507921 dated September 07, 2019; 507925 dated October 17, 2018; 508154 dated September 07, 2018; 508330 dated October 17, 2018 and 508155 dated September 07, 2018 entered into between the Applicant/Defendant No.1 and Respondent No.1/Plaintiff in accordance with Section 45 of the Arbitration and Conciliation Act,1996.

PRAYER IN A.NO.5728 OF 2019: This Application is filed under Order XIV Rules 8 of the O.S. Rules r/w Order 39 Rule 4 of the Civil Procedure Code 1908 to vacate the interim injunction dated 05.07.2019 granted by this Court in O.A.No.645 of 2019 and to dismiss the same.

PRAYER IN A.NO.5729 OF 2019: This Application is filed under Order XIV Rules 8 of the O.S. Rules and Order III Rule 1 of the O.S. Rules r/w Clause 12 of the Letters Patent to revoke the leave granted in A.No.4516 of 2019 to institute C.S.No.407 of 2019.

PRAYER IN A.NO.5730 OF 2019: This Application is filed under Order XIV Rules 8 of the O.S. Rules r/w Order VII Rule 11 of the Civil Procedure Code, 1908 to reject the plaint filed by the Respondent No.1/Plaintiff in C.S.No.407 of 2019 as not maintainable including for want of jurisdiction.

PRAYER IN O.A.NO.644 OF 2019: This Application is filed under Order XIV Rule 8 of the O.S. Rules r/w Order 39 Rule 1 and 2 of Civil Procedure Code, 1908 to pass an order of interim injunction restraining the respondents 1 and 2/defendants 1 and 2 from proceedings initiated by the first respondent in FOSFA Case No.779 on the file of the second respondent pending disposal of the suit.

PRAYER IN O.A.NO.645 OF 2019: This Application is filed under Order XIV Rule 8 of the O.S. Rules r/w Order 39 Rule 1 and 2 of Civil Procedure Code, 1908 to pass an order of interim injunction restraining the respondents 1 and 2/defendants 1 and 2 from proceedings initiated by the first respondent in FOSFA Case No.779 on the file of the second respondent pending disposal of the suit.

For Applicant	Mr.Nakul Dewan, Senior Counsel for Mr.Anirudh Krishnan
For Respondent	Mr.P.H.Arvinth Pandian, Senior Counsel for Mr.S.Santhosh

O R D E R

Two parties, namely, Sunraja Oil Industries Private Limited (Sunraja) and Gem Edible Oils Private Limited (Gem) - which had entered into

contracts for the purchase of crude sunflower seed oil(CSSO) of edible grade from ADM International Sarl (ADM), a company registered in Rolle, Switzerland - filed two separate suits (C.S.Nos.406 and 407 of 2019) against ADM , which was arrayed as the first Defendant in each suit, and others. Each of the suits is for a declaration that the arbitration proceedings (Case Nos.778 and 779) instituted by ADM against Sunraja and Gem, respectively, before an arbitral institution, viz the Federation of Oil Seeds & Fats Association(FOSFA), which was arrayed as the second Defendant, are void and/or against public policy as also for a declaration that specific contracts between the respective Plaintiff (i.e. Sunraja or Gem, as the case may be) and ADM are null and void. A consequential permanent injunction to restrain ADM from initiating, proceeding with, or continuing with arbitration proceedings is also claimed apart from damages of Rs.1,00,01,000/- .

2. In each suit, the respective Plaintiff filed an application for an interim injunction to restrain ADM and FOSFA from proceeding with the arbitration proceedings. By separate orders dated 05.07.2019 in the interim Application filed in each suit, an order of injunction was granted restraining FOSFA, the second Respondent, from proceeding with the respective arbitration case until 29.07.2019. The said interim order was subsequently

extended on various dates in July to October 2019 and, eventually, extended until further orders by order dated 14.11.2019.

3. In these circumstances, ADM filed similar applications, in each suit, for the following relief: to vacate the interim injunction; to revoke the leave granted; to reject the plaint; and to refer the dispute for arbitration. These applications were heard jointly because they raise common issues and are disposed by this common order.

4. The Plaintiff, in each suit, is a company registered in India and engaged in procuring CSFO of edible grade in bulk cargo from the international market. Bromex Private Limited (Bromex), a company incorporated in India, the third Defendant, acted as the intermediary or broker for facilitating the purchase of CSFO. The dispute in C.S. No.407 of 2019 relates to 12 contracts that were executed between July 2018 and June 2019 by Gem and ADM. As regards C.S.No.409 of 2019, the dispute pertains to 13 contracts that were executed by Sunraja and ADM between May 2018 and June 2019.

5. The respective Plaintiff asserts that there are only four companies which sell CSFO. Out of the four companies, Louis Defrys exited the Indian

edible oil market. The second seller, M/s.Cargill, does not do business through brokers but only undertakes business directly. The third seller, Bunge Limited, does not undertake much business on the east coast of India. The Plaintiff, in each case, previously procured CSFO from a company called Nidera between 2011 and 2018. Nidera was a family-run concern with South American owners. However, in August 2017, Nidera was acquired by COFCO, a Chinese Company. Upon take over of Nidera by COFCO, the requirement for documentation increased, and it was difficult for the Plaintiff to procure CSFO from COFCO. Consequently, the Plaintiff had no option except to procure CSFO from ADM.

6. The respective Plaintiff also asserts the following. The trade practice is for the broker to nominate a vessel and inform the buyer. Once the buyer confirms the order, the cargo would be loaded onto the vessel. Thereafter, the buyer is required to open letters of credit. Each contract was on CIF (Cost, Insurance and Freight) basis and the Plaintiff-buyer was entitled to exclusivity. In other words, the vessel was required to carry only cargo meant for the Plaintiff and not for other buyers. This condition was repeatedly breached by ADM. In addition, there were various quality related issues. The contract was emailed to the Plaintiff only after the cargo was loaded onto the vessel. Even at that juncture, the standard form contract,

namely, FOSFA Form 54, was not provided to the Plaintiff. The contracts are unconscionable because they are totally discriminatory against the buyer. While the seller is entitled to terminate the contract, a corresponding right is not extended to the buyer. Consequently, even though there were major quality issues and repeated breaches of the exclusivity condition, the Plaintiff was constrained to continue procurement from ADM.

7. With regard to the arbitration clause, the contention of Sunraja and Gem is as under. Although there is an arbitration clause in each contract, the arbitral institution is FOSFA. FOSFA is an organisation which is fully controlled by the prominent sellers of oil seeds such as ADM; and the rules of FOSFA do not permit the party to be represented by an advocate. Therefore, the arbitration agreement is void and cannot be enforced. The suits and the applications for interim anti-arbitration injunction were filed in the above mentioned facts and circumstances.

8. I heard Mr.Nakul Dewan, learned senior counsel, assisted by Mr.Anirudh Krishnan, learned counsel, on behalf of the first Respondent/first Defendant; and Mr.P.H.Arvinth Pandian, learned senior counsel, assisted by Mr.S.Santosh and K. Magalingam, learned counsel, for the first Respondent/Plaintiff.

9. Mr.Nakul Dewan submitted that the respective Plaintiff and the first Defendant executed multiple contracts for the sale and purchase of CSFO. All these contracts were based on FOSFA's Standard Form 54 subject to variations as agreed to between the parties. Many of the contracts were acted upon by the buyer and seller by performing reciprocal obligations thereunder. The contracts admittedly contain an arbitration clause which provides for the resolution of disputes by an arbitral tribunal constituted by FOSFA. The contracts also admittedly provide that the governing law is English law and that court proceedings, if any, should be instituted before the appropriate courts in England. In these circumstances, Mr.Dewan submits that the suits filed by the respective Plaintiff are not maintainable. Consequently, the respective application for interim injunction is also liable to be dismissed. In support of this contention, he relied on the judgment of the Hon'ble Supreme Court in **Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd. (2003) 4 SCC 341 (Modi Entertainment)**.

10. He also submitted that Sunraja and Gem challenge specific provisions of the contracts executed by them and contend that the contracts are, therefore, void and unenforceable. On this issue, he contended that the arbitration agreement is separate and distinct from the other clauses of the

contract and that even it is concluded that the rest of the contract is void or unenforceable, the same would not affect the arbitration agreement. The judgments of the Hon'ble Supreme Court in **Sasan Power Ltd. v. North American Coal Corporation (India) Pvt. Ltd. (2016) 10 SCC 813 (Sasan)** and **World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd. (2014) 11 SCC 639 (MSM)** were cited in support of the proposition that an arbitration agreement is independent and distinct from the other provisions of the contract. As a corollary, he contended that the challenge, if any, to the other provisions should be made before the arbitral tribunal and not before any other forum. The applications under Section 45 of the Arbitration and Conciliation Act, 1996 (the Indian Arbitration Act) are, therefore, liable to be allowed.

11. With regard to the grant of an anti-arbitration injunction, he submitted that such order is liable to be vacated because the contract clearly provides for dispute resolution through arbitration under the auspices of FOSFA. He also pointed out that FOSFA is a globally recognised arbitral body and that the allegations of Sunraja and Gem, as regards FOSFA, are unsubstantiated and liable to be rejected out of hand. Given the fact that there is an arbitration clause and the contract is governed by English law, he submitted that this Court should decline to exercise jurisdiction and vacate

the interim order which is currently continuing to operate. For this proposition, he relied on a judgment of the Delhi High Court in **Dholi Spintex Pvt. Ltd. v. Louis Dreyfus Company India Pvt. Ltd., CS (Comm)286/2020, Judgment dated 24.11.2020.**

12. On the other hand, Mr.Arvinth Pandian, learned senior counsel for the Respondent/Plaintiff, submitted that the contracts are contrary to public policy and, consequently, void. With specific reference to the termination clause, which enables termination by ADM but not by the Indian counter-party, he contended that such clause is unconscionable. Indeed, he contended that Sunraja and Gem could not terminate the contracts in spite of the repeated breaches of the exclusivity requirement by ADM, as evidenced by the correspondence between the parties. He also referred to the judgments of the Delhi High Court in **Unikol Bottlers Ltd. v. Dhillon Kool Drinks AIR 1995 Del 25** and **Classic Motors Ltd. v. Maruti Udyog Ltd.. 1995 SCC Online Del 94** to buttress this contention. Although FOSFA Form 54 enables termination by either party, such clause is not contained in the contracts signed by the parties. Besides, he submitted that the standard form was not provided to the respective Plaintiff at the time of execution of the contract. Indeed, he submitted that FOSFA Form 54 is not accessible even from the website of FOSFA. In support of the contention

that mere reference to FOSFA Form 54 in the executed contracts is insufficient for the incorporation thereof, reference was made to the judgments of the English courts in **Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd. (1988) 1 All ER 348 (Interfoto)** and **AEG (UK) Limited v. Logic Resource Limited [1996] CLC 265 (AEG)**.

13. In addition, he contended that the arbitration agreement is also void inasmuch as FOSFA is controlled by oil seed producers such as ADM, and it does not qualify as a neutral arbitral institution. Indeed, the respective Plaintiff is not even entitled to engage the services of advocates to prosecute the proceedings in such arbitration.

14. With regard to the arbitration agreement, he submitted that FOSFA is not a neutral arbitral institution but is completely controlled by oil seeds producers. According to Mr. Pandian, even the empanelled arbitrators are not neutral. By referring to the panel of arbitrators, he contended that each person named therein has some connection to the one or the other of the major oil seeds producers. In effect, he contended that the empanelled arbitrators are clearly in a conflict of interest situation but are, nevertheless, permitted to act as arbitrators as per the rules of FOSFA. As regards the test of bias, he contended that it is not necessary to prove actual bias and that it

is sufficient to establish justifiable doubts of bias, which threshold has been satisfied by the respective Plaintiff. For this proposition, **Laker Airways Inc v. FLS Aerospace Ltd. (1992) 2 Lloyd's Report 45(Laker Airways)** was relied upon. For all these reasons, he submitted that the respective Plaintiff cannot expect an impartial adjudication through such arbitration.

15. The conduct of both ADM and FOSFA leave much to be desired according to Mr.Arvinth Pandian. In spite of the grant of an interim injunction by this Court, he pointed out that the arbitration proceedings resumed and, in fact, culminated in an *ex parte* arbitral award against the respective Plaintiff. Thus, FOSFA-the second Defendant did not participate in proceedings before this Court and in flagrant disregard of the order of injunction proceeded with the arbitration proceedings and granted an arbitration award in favour of the first Defendant. This underscores the lack of neutrality and the blatant disregard for the Indian judiciary. Hence, he submitted that the order of interim injunction should be made absolute and the applications filed by the first Defendant should be rejected.

16. By way of rejoinder, Mr.Nakul Dewan pointed out that it is false that the Plaintiff did not receive FOSFA Form 54. Such contention was not raised while the transactions were effected. The contention that the arbitral

panel of FOSFA is not neutral was also strongly refuted. According to Mr.Dewan, the respective Plaintiff should not be permitted to resile from the contractual remedy of arbitration especially when the Plaintiff has miserably failed to demonstrate that such remedy is not effective. Mr.Dewan also pointed out that the first Defendant had approached the High Court of England and Wales to prevent the respective Plaintiff from prosecuting the proceedings in India and that the UK Court had granted an order restraining the respective Plaintiff from prosecuting proceedings otherwise than in the manner specified by the contracts. The legal position with regard to the grant of anti-arbitration injunction is well settled and the Hon'ble Supreme Court had laid down the limited circumstances in which interference is warranted. The present case clearly does not qualify. Consequently, the applications filed by the first Defendant are liable to be allowed and the interim injunction is liable to be vacated.

17. I considered the rival contentions and examined the materials on record. The FOSFA Rules of Arbitration and Appeal open with a preamble, which is of relevance, and is, in relevant part, as under:

“PREAMBLE

Any dispute arising out of a contract or contracts
subject to these Rules, including any questions of law
arising in connection therewith, shall be referred to

arbitration in London (or without prejudice to the juridical seat elsewhere if so agreed) in accordance with the Arbitration Act 1996 and any statutory modification or re-enactment thereof for the time being in force.

The juridical seat of the arbitration shall be, and is hereby designated pursuant to Section 3 of the Arbitration Act 1996 as, England.”

From the above, three aspects are evident: first, parties agreed to resolve disputes through arbitration; secondly, parties agreed that the arbitration would be governed by the Arbitration Act 1996 (the English Arbitration Act); and, thirdly, the juridical seat has been designated as England in terms of the English Arbitration Act. The relevant arbitration clause should be examined next. FOSFA Form 54 contains an arbitration clause, which is set out below:

“29.ARBITRATION: Any dispute arising out of this contract, including any questions of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Associations

Limited, in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant.

Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal (as the case may be), in accordance with the Rules of Arbitration and Appeal of the Federation, and it is hereby expressly agreed and declared that the obtaining of an Award from the arbitrators, umpire or Board of Appeal (as the case maybe), shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute.”

18. Likewise, the contracts that were executed between the respective Plaintiff and the first Defendant also contain an arbitration clause, which is

as under:

“Arbitration: All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this Contract or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Associations Limited (FOSFA) of which the parties admit to have knowledge and notice and hereby accept.

Nothing contained under this Clause (including any rules of the FOSFA incorporated herein) shall prevent the parties from seeking to obtain security in respect of their claim or counter claim via legal proceedings in any jurisdiction, provided such legal proceedings shall be limited to applying for and/or obtaining security for a claim or counter claim, it being understood and agreed that the substantive merits of any dispute or claim shall be determined solely by arbitration in accordance with the provisions of this Clause. For the avoidance of doubt, the liberty

under this Clause to obtain security includes any steps taken to protect and/or preserve a party's proprietary or other interest in goods that are partially or wholly the subject of this and/or any related contract(s).”

19. The executed contracts also contain a governing law clause, which is as under:

“This contract shall be governed by and construed in accordance with English law.”

FOSFA Form 54 also contains a clause pertaining to domicile. The said clause is as under:

“27. DOMICILE: This contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by English law. Any dispute arising out of or in connection therewith shall be submitted to arbitration in accordance with the Rules of the Federation. The serving of proceedings upon any

party by sending same to their last known address together with leaving a copy of such proceedings at the offices of the Federation shall be deemed good service, rule of law or equity to the contrary notwithstanding.”

20. Apart from the above material clauses, the executed contracts contain a clause that incorporates FOSFA Form 54, and the said clause is, in relevant part, as under:

“Governing contract

All terms conditions and rules contained in the current edition of contract no.54 of FOSFA (of which parties admit knowledge and notice) shall, except so far as the same may be notified or varied above, be deemed to be incorporated in and to form part of this contract....”

21. When the above clauses are examined cumulatively, the undisputed position that emerges is that all disputes are required to be referred to arbitration in accordance with the Rules of Arbitration and Appeal of FOSFA. As stated earlier, such arbitration would be governed by

the English Arbitration Act and the juridical seat of arbitration is England. It is also evident that the contracts are required to be construed in accordance with English law. Thus, there is little doubt that the contract discloses the parties' intention that the governing and curial law is English law, and that the arbitration would be governed by the FOSFA Rules of Arbitration and Appeal. Consequently, the arbitral tribunal constituted as per the contracts and not Indian courts should exercise jurisdiction, in the first instance, and, thereafter, challenges, if any, would lie before the English courts. The only exception that the contracts carve out, in this regard, is as regards interim measures to secure the claim or counter claim, as the case may be, which may be requested for before an appropriate court; but it is certainly not the case of the respective Plaintiff that these suits would qualify as actions for such interim measures.

22. This leads to the question whether a case is made out to grant an anti-arbitration injunction. The principles relating to the grant of anti-suit injunctions were examined and formulated in paragraph 24 of **Modi Entertainment**, wherein the Supreme Court held, *inter alia*, that an anti-suit injunction would not be granted to forbear the exercise of jurisdiction by the forum chosen by the parties. Likewise, the law on anti-arbitration injunctions was considered in **McDonalds India Pvt. Ltd. v. Vikram**

Bakshi 2016 SCC Online Delhi 3949 (McDonalds) by a Division Bench of the Delhi High Court, wherein the Court underscored the fact that the threshold tests for an anti-arbitration injunction are more exacting than that applicable for an anti-suit injunction and concluded that the principal considerations would be those underpinning Section 45 of the Indian Arbitration Act, i.e. whether there is an arbitration agreement; and whether such agreement is null and void, inoperative or incapable of being performed. I respectfully concur with the principles set out therein. Therefore, these tests should be applied to the case at hand.

23. A contention was raised that FOSFA Form 54 was not provided to the Plaintiff, and this contention should be examined. Upon *prima facie* examining the documents on record, I do not find any contemporaneous document complaining of the non-receipt of FOSFA Form 54. On the contrary, the executed contracts contain a clause stating that the parties admit knowledge and notice of contract Form 54 of FOSFA. In this context, it is noteworthy that reciprocal obligations were fulfilled by the buyer and seller as regards some of the executed contracts, all of which used the same template, and the allegation that contract Form 54 was not received did not surface then. Therefore, the material on record does not *prima facie* support the contention that the respective Plaintiff did not have a copy of the contract Form 54 of FOSFA. However, in order to not prejudice the

contesting parties in proceedings before the appropriate forum, I do not propose to enter conclusive findings.

24. As regards the contention that the contract is unconscionable because it permits termination by the seller but not by the buyer; *prima facie*, such contention appears to be untenable in view of the incorporation of contract Form 54 in the executed contracts with the consequential recourse to the termination clause contained therein. Although it was urged on behalf of the respective Plaintiff, by placing reliance on **Interfoto** and **AEG**, that mere reference to contract Form 54 is insufficient, upon examining the relevant clause, I find that the text *prima facie* discloses the intention to incorporate Form 54, albeit subject to agreed variations, and it is not a case of mere reference thereto as per principles formulated in that regard in cases such as **M.R.Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd. (2009) 7 SCC 696**. Even otherwise, such contention could be raised before the arbitral tribunal and before the appropriate courts in the UK, if the awards are challenged, given the fact that the governing law under the contract is English law. The above conclusion would apply equally to the contention that the respective Plaintiff did not have a choice in the matter of procuring CSFO and could only procure the same from ADM. The distinction between an arbitration clause and the other provisions

of the contract becomes material in this context, and both severance and the *Kompetenz-kompetenz* principle are firmly entrenched in Indian jurisprudence, as is evident from **Sasan** and **MSM**.

25. The respective Plaintiff also contended that the arbitral institution is not neutral inasmuch as it is controlled by oil seed producers. In effect, the respective Plaintiff appeared to contend that any arbitral institution which is set up by a trade organisation is not neutral. On this issue, reliance was placed on **Laker Airways** to contend that the onus on the plaintiff is limited to establishing justifiable doubts of bias, and that actual bias need not be established. While “justifiable doubts of bias” may be a valid test when an arbitral tribunal is challenged either before such tribunal or before a jurisdictional court; as stated earlier, a higher threshold should be satisfied for an anti-arbitration injunction because the plaintiff should justify the departure from the contractual dispute resolution mechanism. There are several arbitral institutions spread across the world which are established by organisations or entities that represent the interest of the specific trade. This is particularly the case with regard to trade in commodities such as cotton, oil, spices and the like. The rationale for the establishment of such arbitral institutions is that domain expertise is necessary to effectively adjudicate such disputes and trade practice and the knowledge thereof is also

significant. In the present context, unless it is *ex facie* evident that the contractual remedy is unconscionable and illusory, either because there was no genuine agreement to resolve disputes through arbitration or for other comparable and compelling reasons, there is no basis to interfere with the contractual dispute resolution process. The material on record does not support a conclusion that the FOSFA arbitral institution is *ex facie* not neutral and I see no reason to draw such conclusion merely because FOSFA is an organisation representing the interest of traders in oil seeds and fats.

26. The next contention that should be dealt with relates to the alleged lack of neutrality on the part of the arbitrators. Although such allegation is levelled by the respective Plaintiff, no actionable material has been placed before this Court to substantiate the contention that all the panel arbitrators of FOSFA or the specific arbitrators in the present case are not neutral. Indeed, the facts on record disclose that the respective Plaintiff proceeded to nominate its arbitrator upon receiving a notice of arbitration from ADM. The decision to abandon the arbitral process and institute proceedings before this Court was taken subsequently. In any event, any grievance on this score should be canvassed before the arbitral tribunal and/or the courts in the UK in accordance with applicable law.

27. A contention was raised that the arbitral institution does not

permit a party to be represented by an advocate or practising lawyer, but that ADM was permitted to avail such assistance. On perusal of the English Arbitration Act, I find that there are mandatory provisions that ensure equal opportunity (Section 33). Indeed, there are provisions to challenge an arbitrator (Section 23 and 24) and provisions that enable: jurisdictional challenges (Section 67); challenges on the ground of serious irregularity (Section 68); and on a point of law (Section 69). Although such provisions are hedged with conditions, it is clear that the grounds of challenge raised here by the respective Plaintiff could have been and may still be raised before the arbitral tribunal or the English courts.

28. Thus, the respective Plaintiff has failed to demonstrate that the arbitration agreement is null and void, inoperative or incapable of being performed. In light of the above discussion and analysis, I find no reason to continue the anti-arbitration injunction. Consequently, the order of injunction granted originally on 05.07.2019 and extended periodically stands vacated. I also conclude that this Court does not have jurisdiction. As a corollary, the applications to revoke leave are allowed.

29. Before concluding, there is another aspect to be discussed. The order of interim injunction of this Court, which restrained FOSFA from continuing with the arbitration, remained in force until date. During this period, ADM approached the High Court of England and Wales and

obtained an order dated July 22, 2019 restraining the respective Plaintiff from, *inter alia*, taking further steps to prosecute the suit before this Court or to prevent ADM from pursuing either the proceedings before the English Court or the arbitration proceedings. The said order was extended by order dated August 28, 2019. Pursuant thereto, it appears that the separate arbitration proceeding against Sunraja and Gem continued and a first partial award was issued by the Arbitral Tribunal on July 29, 2020. From the proceedings of the Arbitral Tribunal, it is evident that Sunraja and Gem did not participate in such proceedings. On these facts, it was contended on behalf of the respective Plaintiff that both FOSFA and ADM proceeded with the arbitration in flagrant violation of the order of this Court and that such conduct vitiates the proceedings. There is no doubt that the appropriate course of action for ADM would have been to proceed with the arbitration after the order of injunction of this Court was discharged upon consideration of its applications. However, in view of the conclusions in the preceding paragraph that the respective Plaintiff has failed to make out a case for an anti-arbitration injunction and that this Court does not have jurisdiction, I do not propose to interfere with the arbitral process. In my view, the stature and prestige of the Indian judicial system is enhanced by consistently enforcing the rule of law and, by contrast, is undermined if jingoistic impulses hold sway or one-upmanship is indulged in.

30. Notwithstanding such conclusion, if so advised, it would be open to the respective Plaintiff to cite these proceedings and seek exclusion of time to appeal against the first partial award in accordance with the Rules of Arbitration and Appeal of FOSFA or to initiate appropriate proceedings in the courts in the UK in accordance with the English Arbitration Act. The question as to whether the contesting parties had a reasonable opportunity to present the case and whether a party was under some incapacity could become material if an action for enforcement is initiated subsequently in an Indian court. Although ADM has made out a case in the applications under Section 45 of the Arbitration Act, it is not necessary to refer the parties for arbitration because arbitral proceedings have already culminated in a first partial award. Accordingly, the applications to refer the parties to arbitration are disposed of subject to the observations and conclusions contained herein. In view of the orders in the applications to revoke leave and in the Section 45 applications, no orders are necessary in the applications to reject the plaint; therefore, said applications are closed.

31. In sum:

- (i) Application No.5724 of 2019 in C.S.No.406 of 2019 and Application No.5728 of 2019 in C.S.No.407 of 2019 to

vacate the interim injunction are allowed; consequently, O.A.No.644 of 2019 in C.S.No.406 of 2019 and O.A.No.645 of 2019 in C.S.No.407 of 2019 are dismissed;

(ii) Application No.5725 of 2019 in C.S.No.406 of 2019 and Application No.5729 of 2019 in C.S.No.407 of 2019 to revoke leave are allowed;

(iii) Application No.5723 of 2019 in C.S.No.406 of 2019 and Application No.5727 of 2019 in C.S.No.407 of 2019 to refer the matter to arbitration are disposed of; and

(iv) Application No.5726 of 2019 in C.S.No.406 of 2019 and Application No.5730 of 2019 in C.S.No.407 of 2019 to reject the plaint are closed.

(v) Keeping in mind the award of costs in the arbitration and other facts and circumstances, there will be no order as to costs.

Sd./-S.K.R.J.

22/04/2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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