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NAFED V. ALIMENTA: DEPARTURE FROM JUDICIAL TREND AND SETBACK TO ENFORCEMENT REGIME

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ABSTRACT

This article briefly examines the statutory provisions and judicial trend towards enforcement of foreign award. The Article focuses on how the most recent judgment of the Supreme Court in the case of NAFED v. ALIMENTA[2] is a complete departure from the judicial trend and in conflict with another recent judgment of the co-ordinate bench in Vijay Karia v. Prysmian[3], and a setback to the regime of enforcement of foreign award in India. Article 51 of Constitution of India, stipulates that the State shall endeavour to encourage settlement of international disputes by arbitration.

Conventions & Enactments:

The first and foremost international convention in relation arbitration was the Geneva Protocol, 1923 which was followed by the Convention of 1927. As per Geneva Convention, in order to enforce the award in a foreign territory, a party was required to prove that the awards had become final and enforceable in its country where the arbitration took place. For the said purpose, the successful party was required to seek a declaration in this regard. Since this was major road block and limitation in relation to a party seeking enforcement of a foreign award, it led to the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York, 1958. It replaced the Geneva Convention and gave the parties a much more simple and effective method of obtaining recognition and enforcement of foreign award.

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[2] Civil Appeal No. 667 of 2012, decided on 22.04.2020

[3] 2020 SCC Online SC 177

India was a signatory to the Geneva Protocol and Convention as well as the New York Convention. India was amongst the forerunners to adopt New York Convention by enacting the Foreign Awards Foreign Awards (Recognition and Enforcement) Act, 1961.

United Nations Commission on International Law (UNCITRAL) which was established subsequently in 1969, adopted the Model Law on International Commercial Arbitration in 1985. The General Assembly of the UN recommended that all countries give due consideration to Model Law in order bring uniformity of law in disputes arising out of international commercial relations.

The Model Law was also adopted by India by enacting the Arbitration and Conciliation Act of 1996 and the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign award was consolidated into one Act. The 1996 Act has since then been amended twice, in 2015 and 2019.

Statutory Scheme:

The Statutory provisions under the 1961 and 1995 have been on the lines of and similar to the provisions of the Convention of 1958 and Model Law of 1985 respectively.

While the 1961 Act was repealed by the 1996 Act, however, the 1961 Act still retained its importance as the arbitrations which commenced prior to coming into force of the 1996 Act, were continued to be government by 1961 Act for the enforcement of foreign award, unless otherwise agreed between the parties (S.85).

Both the 1961 and 1996 defines Foreign Award (S. 2/44), recognize the foreign award (S. 4/46),provides for filing an application for enforcement (S.5/47), and the grounds on which the enforcement can be objected (S.7/48). One of the major differences in the 1961 and 1996 Act is that while under the 1961 Act proceedings were required to initiated to make the award a decree of court, under the 1996 Act, the award is deemed to be a decree of court.

The grounds for objecting the enforcement of foreign award are extremely narrow in both the Acts which have similarly worded provisions (S.7/48) and there is no scope for examination or review of the award on merits. This is primarily for the reason that the party objecting the award has an option to challenge the award in the country of origin and in most cases, the award has already gone through a challenge procedure in the country of its origin.

While there are other grounds of objection, however, the most common ground on which the enforcement is objected to and which has time and again been subject to the scrutiny of the Court is the objection of foreign award being 'contrary to public policy of India'.

Judicial Trend:

RenuSagar:

What could be the scope of challenge to the enforceability of the foreign award in India came for consideration of the Hon'ble Supreme Court in much detail in the celebrated case of Renusagar v. General Electric[4]. The Hon'ble Court while interpreting public policy under Section 7 of the 1961 Act came to the conclusion that the term "public policy" has to be interpreted in a narrower sense and in order to attract the bar of public policy, the award must invoke something more than the violation of the law of India. Since 1961 Act is concerned only with the recognition and enforcement of foreign awards, the expression of 'public policy' must be construed with respect to its application in the field of private international law. Therefore, the scope of enquiry of a foreign award under 1961 Act and the objections are limited to the award being against (i) fundamental policy of Indian Law (ii) the interests of India; or (iii) justice or morality; and it does not enable the party to impeach or object the enforcement of the award on merits.

LalMahal:

After almost two decades of Renusagar, the scope was once again examined in great detail by the Supreme Court in the case of LalMahal v. ProgettoGrano5. The Court echoed the interpretation made in Renusagar and held that the expression public policy used in Section 7 of the 1961 Act much apply equally to the scope and ambit of Section 48 of the 1996 Act and has to be given a narrower meaning. The Court further held that Section 48 of the 1996 Act does not give an opportunity to have a "second look" at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Even the procedural defects in the course of foreign arbitration do not necessarily lead to excuse an award from enforcement on the ground of public policy.

Vijay Karia:

Recently, the Supreme Court had the occasion to once again examine in detail the provisions of S. 48 of 1996 Act and the scope of public policy in the case of Vijay Karia v. Prysmian. Pertinently, Vijay Karia is after the Amendment of 2015 which further narrows down the scope of S.48 and the judgment duly considers the scope of the said amendment. The Court once again affirmed the scope of objections laid down in Renusagar and LalMahal, except the fact that

[4] 1994 Supp (1) SCC 644
[5] (2014) 2 SCC 433

interest of India is no more a ground of objection and held that the objection to the enforcement of a foreign award could be only sustained if it fell within the pigeon hole of S. 48(1)(b).

The Court held that the award may be in violation of public policy of India and offend a most basic notion of justice, if the award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counter claim in its entirety. However, poor reasoning by which a material issue or claim is decided can never fall in the purview of objection to enforceability. The Court reiterated that it ought to give due weight to the issues that are considered essential by the tribunal and cannot examine or reopen the award to decide on merits or substitute its view with that of the Arbitral Tribunal.

The Court also went ahead to hold that the award even being in violation of substantive law will not be against the public policy unless it is against the fundamental policy of Indian law, as has been held in Renusagar. It must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. The Court clarified that "Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honored, hallowed principles which are followed by the Courts.

Vijay Karia apart from reiterating and laying down scope of objection to enforceability also emphasized on the limited role of the Supreme Court in a special leave petition under Article 136 of Constitution against the judgment of the High Court, upholding the enforceability of a foreign award. The Court observed that as the appeal (under S.50) is maintainable only against the judgment refusing to enforce the award and not the other way around (i.e. judgment enforcing the award) the Supreme Court should entertain an appeal only with a view to settle the law, if some new or unique point is raised which has not been answered by the Supreme Court before, so that the Supreme Court judgment may then be used to guide the course of future litigation in this regard. It further observed that it would only be in a very exceptional case that the Supreme Court would interfere with a judgment which recognizes and enforces a foreign award however inelegantly drafted the judgment may be.

Thus, by far the Courts, in consonance with the Convention and Model Law, and international practices of recognition and enforcement of foreign awards, have adopted 'pro enforcement bias' towards the enforcement of foreign awards in India. However, the most recent judgment of the Supreme Court in the case of NAFED v. ALIMENTA, which was passed after Vijay Karia seems to be an exception and departure from the aforesaid judicial trend.

NAFED:

Dispute between NAFED and Alimenta arose out of an agreement for export of 5,000 metric tons (MT) of Indian HPS groundnut by NAFED for the season 1979-80. However, due to the damaged caused to the crop by a cyclone, NAFED could only ship 1900 MT for that season. NAFED sought extension

for the balance 3100 metric tons, and executed addendums for shipping the balance during the 1980-81 season. However, subsequently, NAFED expressed its inability to ship the balance quantity of 3100 MT due to the absence of requisite authority for the 1980-81 season, which NAFED claimed that it was unaware of. NAFED also cited inability as the request of NAFED for permission to export was refused by the government on the ground that (a) there has been significant increase in commodity price compared to contract price, caused by crop failure in USA and (b) NAFED could not carry forward previous years commitment to subsequent year.

The said dispute resulted in initiation of Arbitration before the Federation of Oil, Seeds and Fats Associations Ltd. (FOFSA), London and ultimately resulted in an award dated 15.11.1989 in favour of Alimenta for a sum of USD 4,681,000 alongwith interest. While the award was un-successfully challenged by NAFED before the Board of Appeal, however, it was not challenged further in the Courts of UK, which had the seat of Arbitration.

Upon a petition for enforcement filed by Alimenata before the Delhi High Court in the year 1993, its enforceability in India was objected. Rejecting the objections to enforceability, the award was held to be enforceable by the Ld. Single Judge of High Court by its judgment dated 28.01.2000.

The judgment of the Ld. Single Judge was challenged before the Division Bench, which was dismissed as not maintainable. This led to challenge before the Supreme Court, raising following objections to the enforceability:

(i) whether NAFED was unable to comply with the contractual obligation to export groundnut due to the Government's refusal?;
(ii) whether NAFED could have been held liable in breach of contract to pay damages particularly in view of Clause 14 of the Agreement?; and
(iii) whether enforcement of the award is against the public policy of India?

Leave to appeal was granted and by its judgment the Supreme Court held the award to be ex facie illegal and in contravention of fundamental policy of Indian, and therefore not enforceable in India.

With due regard and respect, in our humble opinion, the aforesaid objections on which enforcement was objected goes to the merits of the dispute and exceeds the scope of examination under S. 48. The judgment allowing the said objections and refusing the enforcement by reviewing the award on merits is a departure from the aforesaid judicial trend, settled in Renusagar, LalMahal and recently reiterated and clarified by the co-ordinate bench in Vijay Karia.

Firstly, while the agreement, under Clause 18, expressly provided for English law as the governing law of the agreement, the Court applied the provisions of the Indian Contract Act, 1872, more particularly, S.32, without examining the position in the English Law. Respectfully, once the governing law was the English law, the Indian law could not have been applied while examining the

enforceability of the award, specially even without examining the position in the English law.

Secondly, on the second objection pertaining interpretation of Clause 14 of the agreement, the Court dived deep into the merits of the matter. After a detailed discussion on contingent contracts and frustration of contracts under S. 32 and S.56 of the Indian Contract Act, the Court undertook its own analysis of Clause 14. The Court arrive at a finding that there was no frustration of the contract (as under S.56) and instead there was a contingent event contemplated under the said clause (as under S.36), which occurred and led to the cancellation of the contract. Respectfully, in the aforesaid scenario, the Court could not have entertained such an objection to enforceability which pertain to merits of award and involve interpretation of the terms of agreement, which is the domain of Arbitral Tribunal and beyond the realm of enforcement jurisdiction, specially, the limited jurisdiction under Article 136, as held in Vijay Karia. Even if it assumed that the analysis of the Arbitral Tribunal of frustration and contingent contracts was erroneous, the Court could not have interfered and substituted its own interpretation and conclusion over the one arrived at by the Arbitral Tribunal, and which at best could have been subject to test by the courts of origin.

Thirdly, the Court held that enforcement of such an award in violation of export policy and the Government order would be against the public policy. Respectfully, the same is also contrary to the scope of objection under S.48, as held in the case of Vijay Karia; which categorically held that merely the fact that the award is against the substantive law or a legislative policy, its enforcement cannot be refused unless and until it is established that it is against the most basic notions and fundamental policy of Indian law. In fact, in Vijay Kariaviolation of FEMA rules was not considered against the most basic notions and fundamental policy and not qualify as an objection to refuse the enforceability of a foreign award.

In our respectful opinion, as the courts have been following pro-enforcement bias when it comes to foreign arbitral awards, the judgment in NAFED refusing the enforcement of the award by dwelling into and reviewing the merits and substituting its own interpretation of the terms of agreement, is a setback to the enforcement regime.

The determination of enforceability is the first step in the process, only after which the execution commences. Another aspect which raises concern and is a setback to enforcement is the time taken to determine the enforceability of the Award. In NAFED the application for enforcement was filed in 1993 before the High Court of Delhi and it has taken almost three decades, before the Supreme Court ultimately refused the enforceability of the Award.

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