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

Date of decision: 5th December, 2018

\+ **EFA (OS) 8/2017 & CMs 9198/2017, 9450/2017 and 13814/2018**

VIRGOZ OILS & FATS PTE LTD. .....Appellant
Through: Mr. Mehfooz Nazki and Mr Rohit Sharma, Advocates.

versus

NATIONAL AGRICULTURAL CO-OPERATIVE MARKETING FEDERATION OF INDIA LTD. ....Respondent
Through: Mr A.K. Thakur, Mr R.K. Mishra, Mr Rishi Raj and Ms Kavita Singh, Advocates.

CORAM: JUSTICE S. MURALIDHAR
JUSTICE SANJEEV NARULA

J U D G M E N T

Dr. S. Muralidhar, J.:

1. This appeal is directed against the order dated 5th December, 2016 passed by the learned Single Judge in Execution Petition No. 149/2015 filed by the Appellant against the judgment debtor, the National Agricultural Co-operative Marketing Federation of India Ltd. ('NAFED') (the Respondent herein) upholding the objections filed by NAFED under Section 48 of the Arbitration & Conciliation Act, 1996 ('the Act') and declining to enforce the Foreign Award dated 5th April, 2012 in favour of the Appellant. Consequently, by the impugned judgment, the learned Single Judge

dismissed the Appellant's aforementioned execution petition.

2. The Appellant is a company incorporated under the laws of Singapore. It claimed to have entered into three separate sales contracts for a sale of 4500 metric tons ('MT') in total of crude palm oil (edible grade) to NAFED. The case of NAFED throughout was that none of the contracts was ever finalized and there was no binding obligation of NAFED thereunder.

3. Both parties corresponded with one Ashok Bansal and Company as the Broker and the submissions of the parties centred around the correspondence between them and the Broker. In order to show that NAFED had accepted the existence of the contracts as well as their binding nature, the Appellant refers to a letter dated 29th July, 2008 sent by NAFED to the Broker requesting that the shipments under the contracts be deferred by the Appellant from August to September, 2008.

4. The Appellant also refers to an email dated 13th August, 2008 sent to the Broker accepting the request of NAFED and deferring the shipments to September, 2008. The Appellant states that pursuant thereto, it had issued amended contracts.

5. The Appellant had nominated the vessel MT PROCESS with a laycan of 5th to 11th September 2008 to lift the cargo. Thereafter, on 2nd September, 2008, the Appellant sent a letter to NAFED through the Broker pointing out that despite the Appellant nominating a vessel, in terms of the contract, NAFED had failed to establish the Letter of Credit ('L/C'). The Appellant requested NAFED to open the L/Cs. When repeated requests to NAFED

were not responded to, the Appellant on 23rd September, 2008 declared NAFED to be in default. The vessel nominated by the Appellant arrived at Kandla Port on 30th September, 2008.

6. The Appellant made a claim for the difference between the contract price and the market price of the palm oil that was to be supplied as well as demurrage. NAFED declined to recognize these claims leading the Appellant to invoke the arbitration clause under the Palm Oil Refiners Association of Malaysia Rules of Arbitration and Appeal, 2005 ('PORAM Rules').

7. In response to the claims filed by the Appellant before the Arbitral Tribunal ('AT') appointed under the PORAM Rules, NAFED filed a Statement of Defence raising the plea that the bargains between the parties were not finalized. Although NAFED accepted that the draft contracts had been forwarded to it through the Broker, it did not communicate acceptance of those contracts. NAFED maintained that they were only at the preliminary stage of negotiation and no concluded contract resulted between the parties.

8. The AT rejected the plea of NAFED, and accepted the Broker's testimony that "having contracts unsigned was the usual trade practice between parties trading palm oil in India at the time". The claims of the Appellant were allowed by the AT by the Award dated 5th April, 2012.

9. Seeking enforcement of the aforementioned award, the Appellant filed Execution Petition No.149/2015 in this Court. One of the central questions

addressed by the learned Single Judge was whether there was an arbitration agreement between the parties. It was held that from the plain language of Section 44 (a) of the Act, for recognition of a foreign Award, it should have been rendered in respect of differences between parties pursuant to an agreement in writing for arbitration to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the 'New York Convention' and mentioned in the First Schedule to the Act) applies.

10. The learned Single Judge also referred to Article-II of the New York Convention which states thus:

> "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."

11. The learned Single Judge then held that factually in the present case, it was seen that the Broker had signed the contracts in his own capacity and not for and on behalf of NAFED. Further, there was no correspondence between the Appellant and NAFED which could establish a meeting of minds. In effect, there was no agreement on the part of NAFED to refer any dispute to arbitration. By the letter dated 29th July, 2008 NAFED had merely requested the Broker to take up the matter of deferment of shipment with the seller i.e. the Appellant. However, this was not inconsistent with NAFED's contention that the bargain between the parties had not been finalized.

12. The learned Single Judge held that 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". Notwithstanding that Part-I of the Act did not apply to Foreign Awards, Section 7 of the Act could be referred to for interpreting the expression 'agreement in writing'. Although the definition under Section 7 (4) of the Act was wider than Article – II of the New York Convention, even by that yardstick in the present case, it was not possible for the Court to conclude that there was a valid arbitration agreement between the parties. After referring to the case law, the learned Single Judge upheld the objections of NAFED that with there being no concluded contract between the parties, a foreign award could not be enforced.

13. This Court has heard the submissions of Mr. Mehfooz Nazki, learned counsel appearing for the Appellant and Mr A.K. Thakur, learned counsel appearing for NAFED.

14. Mr Nazki placed emphasis on the decision in ***Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia Pte. Ltd. 2014 (14) SCALE 92*** to urge that in the present case, the correspondence between the parties clearly showed that there was a binding contract between them.

15. On a careful examination of the aforementioned decision, it is plain that it is distinguishable on facts. In paragraph 19 of the said decision the facts in that case are noted as under:

> "19. In the instance case, admittedly, the Respondent issued a sales contract for supply of goods incorporating in the said sales contract various terms including hundred per cent payment

> against letter of credit and also providing the governing terms as "Singapore Commodity Exchange". Though the Appellant issued purchase order dated 21.08.2008 on terms and conditions set out therein but the Appellant requested the Respondent to change the payment terms mentioned in the sales contract. The request for amendment was accepted by the Respondent."

16. The situation here is very different. No purchase order as such has been issued and there is no letter or written confirmation of NAFED in any form acknowledging that there is any concluded contract between the parties.

17. Mr Nazki then referred to the decision in ***Smita Conductors Ltd. V. Euro Alloys Limited (2001) 7 SCC 728***. In paragraph 8 of the said judgment the contention of the Respondent in that case is that the existence of the contract can be established through exchange of correspondence and the conduct of the parties in spelling out the existence of an agreement, was not accepted by the Supreme Court. It was answered by pointing out that:

> "When the expression agreement in writing is sought to be explained and indicates that it may be in the nature of a contract then obviously the parties have got to sign the same or it may be in the nature of exchange of letters or telegrams, an agreement similarly signed by the parties or resulting as a consequence of exchange of letters or telegrams."

18. On the facts of that case, the Supreme Court declined to examine that aspect further but rested its conclusion "on the principle applicable to the facts emerging in the case".

19. In the present case, the correspondence between the parties does not clearly establish the existence of any concluded contract between the parties, much less any arbitration agreement between them. The view taken by the

learned Single Judge is a plausible one in the facts and circumstances of the case and suffers from no legal infirmity.

20. The appeal is accordingly dismissed, but in the circumstances, with no order as to costs. The applications are disposed of.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

DECEMBER 5, 2018
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HIGH COURT OF DELHI
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