

**Foreign award cannot be enforced if the matter involves violation of export-restrictions
(Supreme Court of India)**

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National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.

Court: Supreme Court of India | **Case number:** Civil Appeal No. 667 of 2012 | **Citation:** 2020 SCC OnLine SC 381 | **Bench:** Arun Mishra, MR Shah, BR Gavai JJ | **Date:** 22 April 2020

A. The facts

A1. The agreement governed by English law for the sale of 5000 Metric Tonnes (MT) of groundnut @ USD 765 per MT

The National Agricultural Cooperative Marketing Federation of India (“NAFED”), an organization of marketing co-operatives, “was a canalizing agency for the Government of India.¹ Alimenta S.A is a wholesale company based in Switzerland.

On 12 January 1980, NAFED and Alimenta entered into an agreement for supply by NAFED of Indian groundnut in 1979-1980. The agreement adopted the terms of a standard form of contract published by the Federation of Oils, Seeds and Fats Associations, which is an international trade association for the oil, seeds and fats industry (“FOSFA” and “the FOSFA 20 Contract”). Under the standard terms, English law governed the main agreement, and the arbitration clause provided for arbitration in London under the Rules of Arbitration and Appeal of FOSFA.

A2. NAFED shipped only 1900 MT; Addendum executed for balance quantity with new shipment period

Of the contracted quantity of 5000 MT under the agreement, NAFED supplied 1900 MT. The parties executed an addendum on 18 August 1980, extending the shipping period to November-December 1980. There was another addendum on 06 October 1980 rolling over the shipping period to the next year (1980-81).

A3. NAFED did not supply the balance quantity. It said it required the permission of the Government, which was not granted

NAFED did not supply the balance quantity. It claimed—first on 01 December 1980—that it required, but did not have, the clearance from the Government of India (“Government”) to carry forward to the next year its export obligations under any contract. NAFED would later assert that it did not know of the restriction at the time of execution of the addendum.

A4. Alimenta Initiated Arbitration. There Were Several Ancillary Court Proceedings Before the Award

Alimenta initiated arbitration under the rules of FOSFA and made the nomination of its arbitrator. NAFED initially took the position that it was not a party to the arbitration agreement and was not aware of the FOSFA arbitration rules or the procedure of appointment of an arbitrator and asked for a copy for reviewing

¹ “A canalizing agency is the term used by a number of countries to describe the state trading enterprise they maintain. The term refers to the channelling, or “canalizing”, of imports and/or exports through a designated product-specific enterprise. Such STEs aim to provide some degree of price stabilization, particularly for producers, as well as to ensure availability of supplies for domestic consumers”.

See https://www.wto.org/english/tratop_e/statra_e/statra_info_e.htm.

it. Alimenta, on the other hand, set a deadline by which it requested NAFED to make its nomination failing which FOSFA would be asked to make the nomination on NAFED's behalf.

From this point onwards, several proceedings ensued. These included, first, a petition in the Delhi High Court (OMP 41/1981) for a declaration that there was no valid arbitration agreement. The court made an ad-interim order to stay the arbitration proceedings. FOSFA nonetheless appointed an arbitrator on behalf of NAFED. The petition was eventually dismissed (on 11 December 1981) when the High Court found that the parties had incorporated into their agreement the arbitration clause in the FOSFA 20 Contract. The matter went to the Supreme Court, which initially stayed the arbitration (by order of 30 April 1982), later giving liberty to Alimenta to bring a suit without prejudice to the arbitration proceedings (by order dated 02 December 1982). Later, however, the Supreme Court dismissed NAFED's appeal. There was another round of litigation in the Bombay High Court and then the Supreme Court.

B. The award and appeal

On 15 November 1989, the tribunal ruled in Alimenta's favour directing NAFED to pay damages of around USD 4,681,000 with interest at the rate of 10.5% p.a. from 13 February 1981 till the date of the award.

NAFED's appeal bore a worse result. The Board of Appeal (constituted under the FOSFA rules) enhanced the pre-award interest from 10.5% to 11.25% p.a.

C. The enforcement application in the Delhi High Court was allowed (*Alimenta SA National Agricultural Coop. Marketing Federation of India Ltd., 2000 (1) ARB LR 576 (Delhi), Suit No. 1885 of 1993*)

Alimenta applied in 1993 to the Delhi High Court for enforcement of the award. K Ramamoorthy J allowed the petition on 28 January 2000. He noted the facts in detail, identified eight issues, and found in favor of Alimenta.

One of the issues he addressed was if the award was opposed to "public policy in India" within the meaning of Section 7 of FARE and whether it was enforceable because of the ban imposed by the Government of India. It was argued that the enforcement would run counter to the prohibition imposed by the Government and hence against public policy.

Ramamoorthy J noted the arbitrator's findings and concluded that the issue was elaborately considered who had found that the ban was self-imposed and that question cannot be raised again on the ground of public policy (see more discussion in the Editorial comments).

D. The Supreme Court's decision

D1. The contract was contingent on permission and became void when the permission was not granted

Speaking for the court, Arun Mishra J first noted three "the main objections" to the enforcement. The first objection he considered was "whether NAFED was unable to comply with the contractual obligation to export groundnut due to Government's refusal"? This question was stated a bit different in another passage which asked: "whether NAFED was unable to carry out contractual obligation given Government's refusal to export, (and) as such the contract became void and unenforceable because of Clause 14 of FOSFA agreement (as a consequence of which) NAFED could not be held liable to pay damages".

The court tested the question under the Indian Contract Act, 1972 ("Indian Contract Act") and concluded that the agreement was void.

Briefly, its reasons were:

- (a) The agreement between the parties had a specific clause- clause 14, which provided that if there is a prohibition of export by an executive or a legislative act, the parties shall have deemed to

apply the restriction to the contract. Also, if the shipment becomes impossible on account of such restriction, the contract or any unfulfilled part shall be cancelled.

- (b) The Government's permission was required under an export control order to carry forward the export to another season. The permission was denied (citing correspondence from the Government of India refusing permission).
- (c) It was apparent that the Government's direction was binding on NAFED.
- (d) The agreement came to an end because of clause 14.
- (e) The agreement was a contingent contract within the meaning of Section 32 of the Indian Contract Act. Grant of the permission was the contingent event. Since the permission was not given, the contract became incapable of performance, and NAFED could not have been fastened the liability to pay.
- (f) The refusal by the Government was a fundamental matter striking at the root. It rendered the contract void under Section 32 of the Contract Act.
- (g) If NAFED had made supply, it would have been unlawful.
- (h) The Government rightly declined permission because the addendum contract was unfair (as the prices had by that time increased three-fold while the addendum had fixed the price at the previous season's rate).
- (i) The High Court had observed that it was a case of self-induced frustration. The High Court failed to note that it was not a case of frustration under Section 56 of the Contract Act. It ignored and overlooked the effect of clause 14, a term based upon the law as applicable in India and based on export restrictions within the realm of public policy.

D2. Enforcement violative of public policy of India (Fundamental policy of Indian law and Justice)

Mishra J then moved on to the question of whether the Government's prohibition was "sufficient to render the award unenforceable" under Section 7 of FARE on the grounds of public policy.

He noted Section 23 of the Contract Act, 1872, and six decisions of the Supreme Court, reproducing specific passages from each of the judgment.

He concluded that it was "apparent from above-mentioned decisions as to the enforceability of foreign awards, Clause 14 of FOSFA Agreement and as per the law applicable in India, no export could have taken place without the permission of the Government. He noted that the matter "pertains to the fundamental policy of India" and it would be against "fundamental public policy of India to enforce such an award." He also observed that enforcement would be against the basic concept of justice.

D3. Other arguments rejected except on the issue of interest.

Though in light of the decision on the public policy issue, Mishra J said it was not necessary to go into other questions, he examined them briefly. He rejected all arguments except the argument on interest:

- (a) *The arbitrator's appointment was in violation of the court's order, and natural justice principle and also was against public policy:* - The court concluded that though it would have been proper for FOSFA to comply with the interim orders (of the Delhi High Court and later the Supreme Court), the proceedings were dismissed way back in 1987. These questions "ought to have been raised at that stage" and cannot be permitted now.
- (b) *NAFED was not allowed to have any legal representation before the tribunal or the Board of Appeal:* - The court observed that the FOSFA Rules did not confer a right of legal representation. Also, in appeal, NAFED could not show prejudice caused by the denial of legal representation.

- (c) *The arbitrator nominated by Alimenta appeared as Alimenta’s counsel before the Board of Appeal, in breach of basic norms of fairness, procedure, and justice:* - Alimenta argued that this was a prevalent practice in the UK at that time. The court noted that “no concrete material has been placed on record to substantiate the objection as to prevailing practice and law in the UK at that time.” While refusing to interfere, the court observed that an arbitrator is supposed to follow ethical standards and ought not to have defended an arbitration award passed by *him in subsequent proceedings*.
- (d) *Enhancement of interest by the Board of Appeal:*- The Court observed that it was not open to the Board of Appeal to enhance interest in the absence of prayer by Alimenta.