



E.P.Nos.68 and 69 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved On	06.03.2024
Pronounced On	28.08.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

E.P.Nos.68 and 69 of 2021

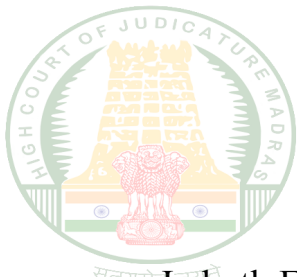
Olam International Limited,
Represented by its Authorized Representative
Anil Shamrao Jadhav ... Petitioner in both E.Ps.

Vs.

Manickavel Edible Oils Private Limited ... Respondents in E.P.No.68 of 2021

Yentop Manickam Edible Oils
Private Limited ... Respondents in E.P.No.69 of 2021

Prayer in both E.Ps: Execution Petition is filed under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 and Order XXI Rule 46 of the Code of Civil Procedure, 1908, for granting recognition to the Arbitral Award as enforceable and deeming it a decree and for attachment of movable and immovable properties under Order XXI Rules 43, 46 and 54 of the Code of Civil Procedure, 1908 as mentioned in the schedule hereunder, and thereafter by issuing warrant of sale under Order XXI Rule 64 of the Code of Civil Procedure, 1908.



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In both E.Ps.

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For Petitioner : Mr.Amitava Majumdar
for M/s.Deepika Murali

For Respondents : Mr.S.R.Rajagopal
Senior Counsel
for Mr.Suhrith Parthasarathy

COMMON ORDER

By this Common Order, both the Execution Petitions filed by the Petitioner/Award Holder to enforce the respective Awards dated **04.02.2021** are being disposed of. Respective Awards read identically. Operative Portion of the respective Awards both dated **04.02.2021** reads as under:-

“5.0 Discussion and Findings:

5.1 As a result of Buyers' failure to participate in this arbitration and in the absence of any challenge to the facts, WE ACCEPT Sellers' submission and supporting evidence of the factual matrix.

5.2 The issues we have been asked to determine are:

- a. Whether a contract was concluded and on what terms;
- b. Whether there is a valid and binding arbitration agreement providing for the FOSFA Rules of Arbitration and Appeal,
- c. Whether there was a default by Buyers in failing to open a letter of credit and the damages resulting from any such default.



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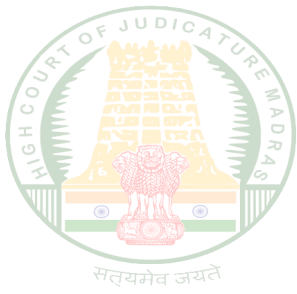
5.3 We are satisfied by Sellers' explanation and evidence relating to the conclusion of the Contract between Sellers and Buyers and the terms and conditions contained therein. While the initial agreement reached between the parties was entered into on 13 January 2020, the final terms and conditions were not finalised until on or about 29 February 2020. WE THEREFORE FIND THAT a contract was entered into between Sellers and Buyers under reference EO/S/00246/20 and with the terms and conditions set out in this award at 1.0 and 2.0 above.

5.4 Having established that a contract was entered into, we now turn to the issue addressed to us regarding the primacy of the law of the Contract, the governing arbitration terms and our jurisdiction.

5.5 The Contract made reference to the inclusion of FOSFA Contract No 81 terms in two places: once in the Pre-Amble and once under other terms. In addition, an express Arbitration Clause referred to arbitration in accordance with PORAM contracts. All three have been recited in full above.

5.6 FOSFA Contract No 81 is a joint FOSFA-PORAM contract along with MEOMA and Sellers advanced the position that by referring to "PORAM contracts" in the Arbitration Clause, on a natural and true construction, the generic reference to "PORAM contracts" includes FOSFA Contract No 81. The parties were thus referring to FOSFA Contract No 81 as the specific contract which they have agreed to incorporate, including its arbitration clause.

5.7 In particular, Clause 32 of FOSFA Contract No 81 requires both parties to expressly agree to arbitration in Malaysia in accordance with the Malaysian arbitration laws in accordance with the PORAM Rules of Arbitration and Appeal. In all other cases, any dispute arising out of the Contract, including any question of law shall be shall be



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referred to arbitration in London in accordance with the Rules of Arbitration and Appeal of the Federation of Oils Seeds and Fats Association Limited.

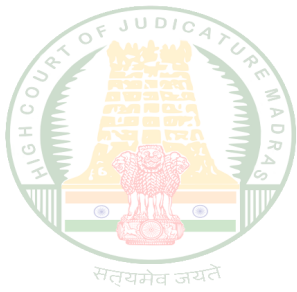
5.8 Sellers submitted to us that there was no express agreement between the parties for disputes to be referred to arbitration in Malaysia. Therefore, Sellers argued that the right forum is London arbitration under FOSFA Rules of Arbitration and Appeal.

5.9 We agree with this submission and FIND THAT there is a binding and valid arbitration agreement between Sellers and Buyers to arbitrate any and all disputes according to the FOSFA Rules of Arbitration and Appeal and that we accordingly have jurisdiction in this reference.

5.10 It follows that the law governing the Contract and the seat of this arbitration are, respectively, English and England. As the seat of the arbitration is England and the Award is subject to English procedural and substantive laws, it therefore follows that it is an English Award for the purposes of recognition and enforcement under the terms of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, AND WE SO FIND.

5.11 We note that Buyers have initiated proceedings in India. Sellers have stated in submissions that this is a breach of the arbitration agreement but did not ask us to make a finding on this issue. We therefore make no comment on these proceedings.

5.12 Turning now to the question of Buyers' breach of contract. Payment is a fundamental condition which goes to the root of a contract and if breached gives the innocent party the right either to terminate or to claim damages. In this case, Sellers and Buyers had agreed an express term for payment, quoted in full at 2.1 above, which essentially provided that Buyers would open an



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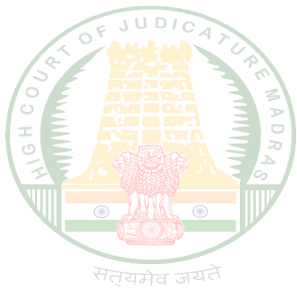
operable letter of credit in Sellers' favour. The Payment Clause was lengthy and gave rise to conflicting timelines by when Buyers were to have established their Letter of Credit. Indeed, Sellers' submission to us attempted to bridge those disparities by summarising that, on a natural and true construction of the payment provision, Buyers must issue a letter of credit at the time of receipt of the vessel's nomination and in any event by no later than three days before the vessel's ETA at the port of discharge.

5.13 Pausing there, Sellers were entitled to receive an operable letter of credit before loading the cargo in Indonesia. In the event that Buyers failed to do so, the Contract contemplated that Buyers would be responsible for the consequences. From the submissions and evidence, Sellers proceeded to load their vessel without a letter of credit in hand and sailed for India notwithstanding. Instead, Sellers' fallback position was to receive a letter of credit three days before the Vessel's arrival at the discharge port of Tuticorin. We note this as Sellers have included a claim for demurrage incurred at the load port. We will return to this issue in the award section below.

5.14 Ultimately, Buyers failed to comply with the payment term of the Contract and were consequently in repudiatory breach of the Contract AND WE SO FIND.

5.15 Therefore, when Sellers held Buyers to be in default on 17 March, the Contract was brought to an end and Buyers were liable to Sellers for damages. WE ACCEPT AND FIND THAT Buyers were in default and WE FIND THAT the date of default was the first business day thereafter, being 18 March 2020.

5.16 Sellers submitted that they sold the cargo on board the MU YUE YOU to Adani Wilmar on 19 March at US\$542.50 per metric ton CFR Mangalore Port, India and claimed the difference between the contract price and the re-sale price as damages in accordance with the Default



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Clause 29 of FOSFA Contract No 81 plus associated costs that flowed from Buyers' default.

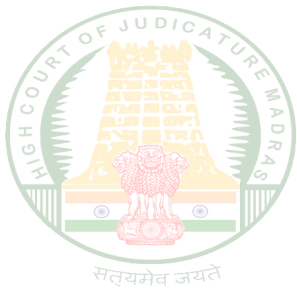
5.17 Turning firstly to the difference between the Contract price and the re-sale of the goods to Adani Wilmar.

5.18 The Contract quantity and price were 4,000 metric tons at US\$779.00 per metric ton CFR Tuticorin. The re-sale contract to Adani Wilmar was for a greater quantity of 8,000 metric tons, of which 4,000 metric tons was appropriated from the subject contract. The balance 4,000 metric tons derived from the Contract with Buyers' associated company subject to a parallel arbitration.

5.19 The price difference due to Sellers is US\$779.00 – US\$542.50 = US\$236.50 per metric ton calculated on the mean contract quantity of 4,000 metric tons. The sum due to Sellers as damages is therefore US\$946,000.00, AND WE SO FIND.

5.20 The re-sale contract was to a different discharge port of Mangalore, India for which Sellers advanced a claim for the cost of extra freight to call additionally at Mangalore of US\$6.00 per metric ton. Sellers supported this claim by providing evidence of an invoice from Jiang Xin Shipping Company, who appear as owners of the MV YUE YOU in the Bills of Lading, for a net sum of US\$38,000.00 for a charter minimum of 10,000 metric tons.

5.21 Prima facie the invoice failed to reconcile with Sellers' claim of US\$24,000.00. Sellers provided no explanation for the deduction of US\$22,000.00 for "Manager Fee" although Sellers did submit that 2,000 metric tons of cargo on board the MV YUE YOU which made up the charter party minimum of 10,000 metric tons was destined for Chennai, India. We accept that submission and accept that the invoice from owners reflected the change of destination from Tuticorin to



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Mangalore for the cargo of 8,000 metric tons, of which the subject contract was 4,000 metric tons.

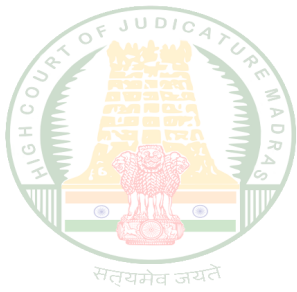
5.22 We agree that the cost of the change of destination to Mangalore is a cost that flowed directly from Buyers' breach and WE SO FIND.

5.23 Drawing these two strands together, we are satisfied that Sellers are entitled to recover half of the additional freight paid for the call at Mangalore of US\$19,000.00, and WE SO FIND.

5.24 Sellers' final head of claim for damage was for US\$14,175.00 corresponding to a pro-rate sum of demurrage incurred at the load port of Padang, Indonesia. This, Sellers submitted, was due to the absence of a letter of credit from Buyers, that caused delays in obtaining certificates of origin from local authorities at the port of loading as a result of Sellers being unable to issue their necessary invoice to the shippers of the cargo. This claim was supported by a Laytime Statement of unknown provenance and made no reference to a delay in obtaining shipping documents.

5.25 We were not assisted by Sellers' evidence that, on 12 March, one day after the Vessel had disconnected hoses, proforma documents were sent to Buyers that included an invoice dated 11 March for US\$725.83 per metric ton, instead of the contract price of US\$779.00 per metric ton. This was omitted from Sellers' pleaded case. Given the inconclusive laytime statement and no proof that demurrage had been accrued or paid by Sellers as a consequence of a breach by Buyers' in failing to establish a letter of credit before loading. WE DISMISS this claim for demurrage at the loadport.

5.26 Turning now to Sellers' claim for interest. By virtue of Section 49 of the Arbitration Act, 1996, we may award simple or compound interest from such dates, at



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such rates and with such rests as we consider meet the justice of the case, either on part or of the whole of any amount awarded. As Sellers have succeeded in their claims, WE FIND THAT interest on the sums awarded at the rate of 4% per annum, compounded quarterly is payable by Buyers to Sellers from 18 March 2020 until the date of settlement.

5.27 Finally Sellers have claimed the costs of the arbitration. The nature of this dispute was straightforward as pleaded by Sellers. The general rule is that costs follow the event, and we see no reason to depart from that. WE THEREFORE FIND THAT Sellers succeed in their claim for costs and those costs are the fees and expenses of this award and shall be for Buyers' account.

6.0 AWARD

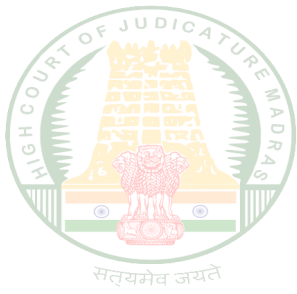
6.1 WE AWARD THAT Sellers' claim SUCCEEDS.

6.2 WE FURTHER AWARD THAT Buyers shall pay to Sellers default damages of US\$946,000.00 (Nine Hundred and Forty-Six Thousand United States Dollars).

6.3 WE FURTHER AWARD THAT Buyers shall pay to Sellers US\$19,000,00 (Nineteen Thousand United States Dollars) being the costs of additional freight.

6.4 WE FURTHER AWARD THAT Buyers shall pay interest on the above sums at the rate of 4% (Four per Cent) per annum pro-rate from 18 March 2020 until the date of settlement of this award.

6.5 WE FURTHER AWARD THAT the fees, costs and expenses of this award amounting £13,597.50 (Thirteen Thousand, Five Hundred and Ninety-Seven Pounds Sterling and Fifty Pence) shall be paid by Buyers. If Sellers have paid any or all such costs, the shall be entitled to immediate reimbursement.”



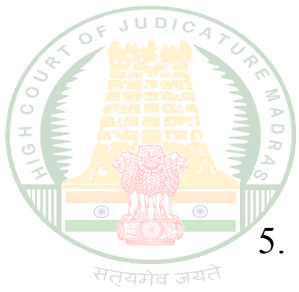
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WEB COPY 2. The documents and pleadings are almost identical in both the Execution Petitions.

3. The Petitioner/Award Holder in the respective Execution Petitions are one and the same. The Respondents/Award Debtor in the respective Original Petitions are two sister companies from Virudhunagar District, Tamil Nadu.

4. Details of the respective Awards and the Execution Petitions filed for enforcement of the respective Awards are as under:-

<i>Sl.No.</i>	<i>E.P.Nos.</i>	<i>Case Nos.</i>	<i>Date of Award</i>
1.	68 of 2021	891 M/s.Manickavel Edible Oils Private Limited Arbitration Award No.4647	04.02.2021
2.	69 of 2021	892 M/s.Yentop Manickam Edible Oils Private Limited. Arbitration Award No.4648	04.02.2021



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5. The Petitioner/Award Holder is seeking to enforce the respective Awards passed by the Arbitral Tribunal on **04.02.2021** in these Execution Petitions.

6. The respective Awards are sought to be enforced by the Petitioner/Award Holder on the ground that the Awards satisfies the definition of “Award” as required under Section 47 of the Arbitration and Conciliation Act, 1996 and conditions stipulated under Section 48 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as “the Act”).

7. The Arbitral Tribunal has passed the respective Awards both dated **04.02.2021** under auspices of Federation of Oils, Seeds and Fats Associations Limited (FOSFA) and awarded amounts to the petitioner. To enforce a Foreign Award, the Petitioner who is Award Holder is required to satisfy that the requirements of Sections 47 and 48 of the Act are satisfied.

8. Opposing the maintainability and enforceability of the Execution Petition against the Respondents/Award Debtors, the learned counsel for the Respondents/Award Debtors, at the outset, submitted that Petitioner/Award Holder failed to satisfy the provisions of Section 47(1)(a) and 47(1)(b) of the



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Arbitration and Conciliation Act by not producing the original signed Award or a certified copy thereof in the manner as required by the laws of the United Kingdom. The Petitioner/Award Holder produced only a supposedly certified copy of the purported Award dated **04.02.2021** which is not in conformity with Section 47(1)(a) and 47(1)(b) of the Act. Now, during the course of the proceedings before this Court, the Petitioner/Award Holder produced a supposedly signed copy of the Award containing three signatures of the three Arbitrators. Evidently, this copy is dated **04.02.2021** signed by the three Arbitrators not on **04.02.2021** but on some other unknown date. It is perceivable that the three Arbitrators could not have signed the Award on the same day given that they are from different continents of the World. In such event, the Petitioner/Award Holder ought to have produced an affidavit from the members of the Tribunal vouching to the fact that the Arbitrators had physically signed the Award on **04.02.2021**, but it is not forthcoming. In this regard, reliance was placed on the decision of the Delhi High Court in the case of **AgriTrade International Pte Limited Vs. National Agricultural Co-operative Marketing Federation of India**, 2012 (128) DRI 371 wherein, it was held that in the given facts of the case, the plea for enforcement of Foreign Award cannot be granted as it would amount to recognizing the existence of an Arbitration Agreement on surmises. The learned Senior counsel also invited the



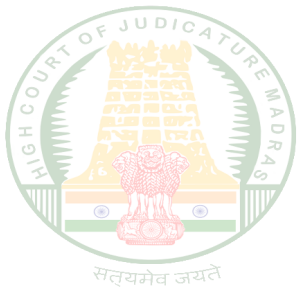
attention of this Court that in compliance of Section 65B of the Indian Evidence

Act, 1872, the Petitioner/Award Holder has not filed an affidavit attesting to these purported electronic communications and such failure vitiates the entire execution proceedings.

9. The Respondents/Award Debtors have raised a preliminary objection to the maintainability of these proceedings under Sections 47 and 48 of the Act.

10. The enforcement of the Award is opposed by the Respondents/Award Debtors on the ground that neither the “certified copy” of the Award was filed at the time of institution of these petitions nor was there a binding contract between the Petitioner/Award Holder and the respective Respondent/Award Debtor. It is therefore submitted that the Awards that have been presented before this Court for being recognized and enforced against the Respondents/Award Debtors in the respective execution petitions are a nullity.

11. It is further submitted that since there were no contract signed between the Petitioner/Award Holder and the respective Respondent/Award Debtor, question of the Respondents/Award Debtors breaching the terms of the contract also cannot be countenanced.



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12. Arguing the case on behalf of the Respondents/Award Debtors, the learned Senior Counsel for the Respondents/Award Debtors would submit that the so called Awards both dated **04.02.2021** were not signed on the date of filing of the petition for enforcing the respective Award in the above Execution Petitions.

13. It is submitted that as per Section 47(1)(a) of the Act, the Petitioner/Award Holder who applies for enforcing Foreign Awards is required to produce the original copy of the Award or copy thereof duly authenticated in the manner required by the law in the Country in which it was made.

14. It is submitted that at the time of filing of the respective Execution Petitions, the Petitioner/Award Holder has enclosed only a photocopy of the so called Awards dated **04.02.2021** bearing the signatures of the respective Arbitrators and the Presiding Arbitrator (Chairman) together with a Certificate of the respective Arbitrators and the Presiding Arbitrator.

15. It is submitted by the learned Senior Counsel for the



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Respondents/Award Debtors that although the filing of the original can be

deferred in terms of the decision of the Hon'ble Supreme Court in **PEC Limited**

Vs. Austbulk Shipping SDN BHD, 2019 (11) SCC 620, the Awards should be a signed copy of the Award that is available.

16. The learned Senior Counsel for the Respondents/Award Debtors would submit that the originals of the Award that was filed later ought to have been filed later whereas, what has been filed is a fresh copy with the original signature of the Arbitrators.

17. It is submitted that the Certificate of the respective Arbitrators and the Presiding Arbitrator states that it was issued in the light of outbreak of Covid-19 pandemic and due to which the original documentation with signature was not possible. It is submitted that the Awards are contrary to the provisions of the Arbitration Act, 1996 of the United Kingdom (England, Wales and Northern Ireland).

18. Specifically, a reference is made to Section 52(3) of the aforesaid Act,



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wherein it has been stated that an Award shall be in writing signed by all the

Arbitrators or all those signing to the Award.

19. It is submitted that mere affixture of the digital image of the signature of the respective Arbitrators and the Presiding Arbitrator would not satisfy the requirements of Section 52(3) of the Arbitration Act, 1996 of the United Kingdom.

20. It is submitted that unless such procedure was sanctioned either by the parties under a contract or under the law in United Kingdom, question of the Award satisfying the requirements of Section 52 of the Arbitration Act, 1996 of the United Kingdom cannot be countenanced for the purpose of enforcing it under Part-II of the Arbitration and Conciliation Act, 1996.

21. In this connection, the learned Senior Counsel for the Respondents/Award Debtors has drawn attention to the decision of the Hon'ble Supreme Court rendered in **Commissioner of Agricultural Income Tax, West Bengal Vs. Keshab Chandra Mandal**, 1950 SCC Online SC 15.

22. Specifically, the learned Senior Counsel for the Respondents/Award



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Debtors would submit that a principle has been clearly laid down that if on a construction of a statute, signature by an agent is not found permissible then the writing of the name of the principal by the agent however clearly he may have been authorised by the principal cannot possibly be regarded as the signature of the principal for the purposes of that statute. It is submitted that if a statute requires personal signature or a mark, it must be that of the person himself or herself. It is submitted that there must be physical contact between that person and the signature or the mark put on the document. He would therefore submit that mere affixing of an image or impression of the signature digitally by the Registrar of FOSFA was not sufficient.

23. The learned Senior Counsel for the Respondents/Award Debtors would draw attention to Section 3(56) of the General Clauses Act, 1897, as per which expression “sign”, with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include “mark”, with its grammatical variations and cognate expressions.

24. It is submitted that what has been filed subsequently pursuant to the



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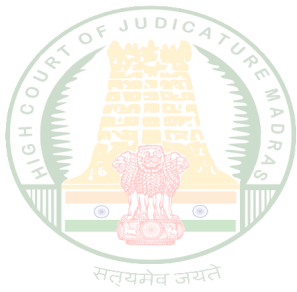
directions of this Court dated **15.11.2023** by the Petitioner/Award Holder

WEB.COM together with affidavit is a copy of the respective Awards both dated **04.02.2021**

does not meet the requirements and therefore the respective Awards both dated **04.02.2021** can neither be recognised nor enforced.

25. It is submitted that the copies of respective Awards both dated **04.02.2021** with the signatures that have been filed subsequently pursuant to the aforesaid order of this Court cannot be construed to be a Original of the signed copy of the respective Awards and therefore, these objections go to the root of the maintainability of these two Execution Petitions to enforce the aforesaid Award.

26. The learned Senior Counsel for the Respondents/Award Debtors would further argue that as per Rule 6 of the Rules of Arbitration and Appeal of FOSFA International, prescribes the procedures under the Federation of Oils, Seeds and Fats Associations Ltd., (FOSFA), then an Award has to be in writing on the official form of the Federation and when an Award has been signed, it is the duty of the federation to date them and give notice to the other party named in the Award. It is to be disbursed upon payment of fees and acceptance of Arbitration.



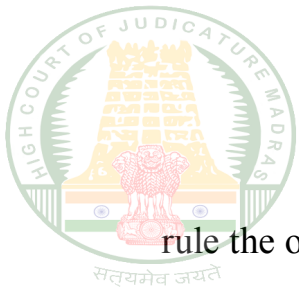
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WEB COPY 27. It is submitted that only on payment of the fees, the Federation could send the Original of the signed copy of the Award to the other party who has paid. In this case, what has been transmitted earlier on **11.02.2021** was merely a draft of the Award purportedly sent by the Arbitrators with digital image/impression of their respective signatures which have been affixed by the Registrar of FOSFA in the copy of the respective draft copy of the Award.

28. It is submitted that the said copy would not constitute as the original of the Award for the purpose of Section 47(1)(a) of the Indian Arbitration and Conciliation Act, 1996.

29. It is submitted that even on the date of hearing, the so called Certificate of the respective Arbitrators dated **04.02.2021** which were sent along with the email dated **11.02.2021** had not been filed. Therefore, the defect has not been cured.

30. Anticipating the arguments of the Petitioner/Award Holder to over



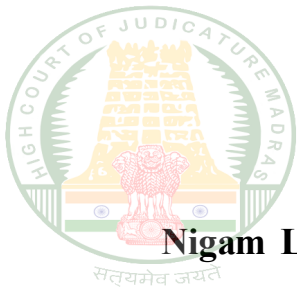
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rule the objection, the learned Senior Counsel would submit that even though an objection was raised by the Registrar on four grounds at the time of filing of the above mentioned Execution Petitions, the objection of the Registry was over ruled and the matter taken before the Hon'ble Division Bench of this Court in O.S.A.Nos.81 & 82 of 2022. The objection was merely confined only to the Registry's objection. It is submitted that merely because the Registrar's objection was over ruled *ex parte* by the Court on **09.02.2021** would not preclude the Respondents/Award Debtors from raising objection regarding maintainability of these two Execution Petitions on the ground that the Original of the Arbitral Awards dated **04.02.2021** has not been filed.

31. It is therefore submitted that on this count alone, the preliminary objection of the Respondents/Award Debtors may be accepted by the Court and the Execution Petitions are liable to be dismissed.

32. The learned Senior Counsel for the Respondents/Award Debtors also drew attention to a decision of the Hon'ble Supreme Court rendered in the context of domestic arbitration and the requirement of the Arbitration Award to be signed. In this connection, he drew attention to the following passages from the decision of the Hon'ble Supreme Court in **Dakshin Haryana Bijli Vitran**



Nigam Limited Vs. Navigant Technologies Private Limited, (2021) 7 SCC

WEB 657. It is submitted that the Hon'ble Supreme Court has underscored mistake of signature. A reference is made to Paragraph Nos.25 to 27, which read as under:-

“25. The legal requirement of signing the arbitral award by a sole arbitrator, or the members of a tribunal is found in Section 31 of the 1996 Act, which provides the form and content of an arbitral award. Section 31 provides that:

*“31. **Form and contents of arbitral award.**-(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.*

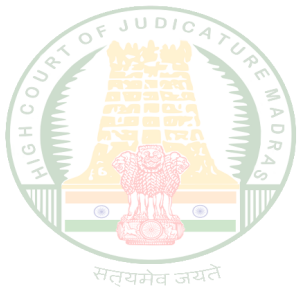
(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reasons for any omitted signature is stated.

.....

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with Section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

26. Section 31(1) is couched in mandatory terms, and provides that an arbitral award shall be made in writing and signed by all the members of the arbitral tribunal . If the arbitral tribunal comprises of more than one arbitrator, the award is made when the arbitrators acting



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*together finally express their decision in writing, and is authenticated by their signatures. **An award takes legal effect that only after it is signed by the arbitrators, which gives it authentication. There can be no finality of the award, except after it is signed, since signing of the award gives legal effect and validity to it. The making and delivery of the award are different stages of an arbitration proceeding. An award is made when it is authenticated by the person who makes it. The statute makes it obligatory for each of the members of the tribunal to sign the award, to make it a valid award. The usage of term “shall” makes it a mandatory requirement. It is not merely a ministerial act, or an empty formality which can be dispensed with.***

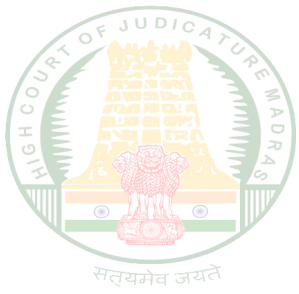
*27. Sub-section (1) of Section 31 read with sub-section (4) makes it clear that the Act contemplates a single date on which the arbitral award is passed i.e., **the date on which the signed copy of the award is delivered to the parties.** Section 31 (5) enjoins upon the arbitrator/tribunal to provide the signed copy of the arbitral award to the parties. **The receipt of a signed copy of the award is the date from which the period of limitation for filing objections u/S.34 would commence.** This would be evident from the language of sub-Section (3) of Section 34 (3) which reads:*

“34.Application for setting aside arbitral award.

...

...

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:



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Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

33. The learned Senior Counsel for the Respondents/Award Debtors would vociferously contend that there is no Arbitration Agreement between the parties in terms of Section 48(1)(a) of the Act, which the Petitioner/Award Holder could enforce. The Sale Contract dated **13.01.2020**, which formed the basis for initiation of arbitration proceedings has not been executed mutually by either of the parties. Referring to Section 44 of the Act, learned Senior Counsel for the Respondents/Award Debtors submitted that a Foreign Award means an Arbitral Award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India. Also by referring to Paragraph 2 of Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral awards, the learned Senior Counsel submitted that the term "agreement in writing" shall mean and include an arbitral clause in a contract or an Arbitration Agreement signed by parties or contained in an exchange of letters or telegrams.

34. It is the contention of the learned Senior counsel for the



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Respondents/Award Debtors that none of the above requirements have been fulfilled in this case and therefore, it has to be held that there is no Arbitral Award at all between the parties, which the Petitioner/Award Holder can enforce against the Respondents/Award Debtors. For this purpose, the learned Senior Counsel for the Respondents/Award Debtors placed reliance on the decision of the Delhi High Court in **Viroz Oils and Fats Ptd. Ltd. Vs. National Agricultural Co-operative Marketing Federation of India**, 2016 SCC Online Delhi 6203 and contended that in identical circumstances, the Delhi High Court refused to enforce a Foreign Award.

35. With respect to composition and constitution of the Arbitral Tribunal, it is submitted that it is against the provisions of Section 48(1)(d) of the Act. According to the learned Senior Counsel, the Respondents/Award Debtors received a Letter dated **01.10.2020** from Palm Oil Refiners Association of Malaysia (PORAM) intimating that the Petitioner/Award Holder requested that the arbitration proceedings, including the constitution of the Tribunal, be put on hold till **30.11.2020**. In fact, in the said Letter, it was stated that Arbitral Tribunal is yet to be constituted. However, the Petitioner/Award Holder now contends that the Arbitral Tribunal was constituted on **09.09.2020** itself and the Petitioner/Award Holder appears to have filed the Claim Statement on



09.10.2020. Thus, it is clear that the constitution of the Arbitral Tribunal itself

is improper. Consequently, the Award passed by the Arbitral Tribunal cannot be enforced or binding on the Respondents/Award Debtors. Even though the Petitioner/Award Holder produced an Award said to have been passed by the Arbitral Tribunal, purportedly signed by the members of the Arbitral Tribunal, such Award, soon after signing, has to be sent to both parties in the manner known to law for the Award to become binding, but it was not done in this case. The copy of the Award has not been sent to the Respondents/Award Debtors, while so, the Respondents/Award Debtors are not in a position to assail the Award. There must be an Award duly signed and served on the Respondents/Award Debtors without which it cannot be expected that the Respondents/Award Debtors could challenge it.

36. Referring to Paragraph No.5.2 of the Award, it is contended by the learned Senior Counsel for the Respondents/Award Debtors that the Tribunal framed issues as to (i) whether the contract was concluded and on what terms (b) whether there is a valid and binding Arbitration Agreement providing for the FOSFA Rules of arbitration and appeal and (iii) whether there was a default by buyers in failing to open a Letter of Credit and damages resulting from any such default. In Paragraph No.1.6, the Tribunal recorded that there was no contract

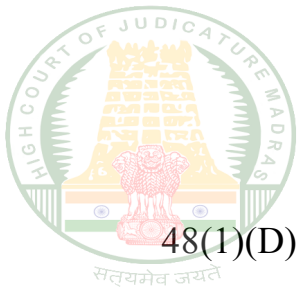


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signed and stamped among the parties, however, it was held in Paragraph

WEB COPY No.5.3 that it is satisfied by the Seller's explanation and evidence in relation to the existence of the terms and conditions among them. The Tribunal has not recorded any independent reason to determine the issue (a) in favour of the claimant. Above all, the jurisdictional pre-condition for reference to arbitration is the intention between the parties to refer a dispute. In the absence of such a requirement, it has to be held that there was no valid and legally binding Agreement exist between the parties. It is also contended by the learned Senior Counsel for the Respondents/Award Debtors that the members of the Arbitral Tribunal were ineligible to be appointed in terms of Section 12 read with Clauses 22 and 24 of the Fifth Schedule of the Act inasmuch as the same Arbitral Tribunal has been nominated by the Petitioner/Award Holder in respect of another arbitration. Accordingly, the learned Senior Counsel for the Respondents/Award Debtors prayed for dismissal of the Execution Petitions as devoid of merits.

37. The enforcement of the Award is questioned. That apart, it is submitted that the Award that has been presented for enforcement under Part II (Enforcement of Certain Foreign challenge) Chapter-I (New York Convention challenge) of the Act is in violation of Sections 47(1)(A), 47(1)(B), 48(1)(A),



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48(1)(D) and Section 48(2)(B) of the Act.

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38. By way of reply, the learned counsel for the petitioner would submit that the objection regarding maintainability of these two Execution Petitions were available to the Respondents/Award Debtors at the earliest point of time after they entered appearance.

39. It is submitted that the Respondents/Award Debtors took a chance before the Hon'ble Division Bench of this Court in O.S.A.Nos.81 & 82 of 2022 and therefore, it is not open for the Respondents/Award Debtors to raise a plea regarding maintainability under Section 47 of the Indian Arbitration and Conciliation Act, 1996, particularly when the original of the respective Awards were duly signed by the respective Arbitrators along with the Presiding Arbitrator which has been filed pursuant to order dated **15.11.2023** of this Court.

40. It is submitted that the Hon'ble Division Bench of this Court by its order dated **21.06.2021** had made it clear that the issue regarding maintainability of the Execution Petition may be taken up before the learned Single Judge and that issue was once again considered by the learned Single



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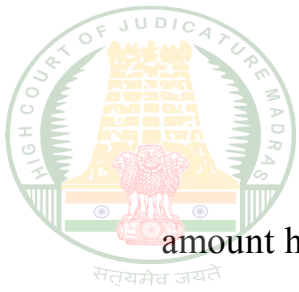
Judge while passing order dated **19.10.2022** regarding the jurisdiction issue and

WEB COPY answered against the Respondents/Award Debtors. It is submitted that SLP filed by the Respondents/Award Debtors before the Hon'ble Supreme Court in S.L.P.Nos.20428 & 20429 of 2022 was also dismissed.

41. It is submitted that there is no scope for dismissing the respective Execution Petitions filed by the Petitioner/Award Holder to execute the Award particularly in the light of the fact that the Originals of the respective Awards duly signed by the respective Arbitrators and the Presiding Arbitrator are before this Court.

42. That apart, the learned counsel for the Petitioner/Award Holder would submit that the Award that was filed along with the respective Execution Petitions was also transmitted to the Respondents/Award Debtors on **11.02.2021** after necessary payments were made by the Petitioner/Award Holder in accordance with the provisions of the Arbitration and Application Rules of FOSFA International.

43. Hence, it is submitted that the Award has to be enforced and the



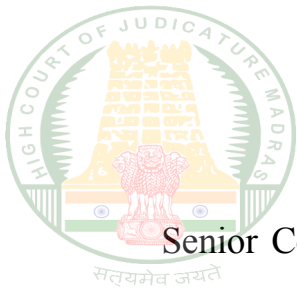
amount has to be recovered from the Respondents/Award Debtors.

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44. The learned Senior Counsel for the Respondents/Award Debtors further drew attention to the requirements of original Agreement for Arbitration has also not been filed and therefore, on this count also the Award is not maintainable. The learned Senior Counsel for the Respondents/Award Debtors submits that even otherwise there were no Agreement between the parties to refer the dispute to Arbitration under the ages of FOSFA International.

45. The learned Senior Counsel for the Respondents/Award Debtors also drew attention to Section 54 of UK Arbitration Act, 1996. Specifically, it was submitted that as per Section 54(2), the date of Award shall be taken as the date on which it is signed by the Arbitrator or where more than one Arbitrator has signed by last them. In this case, the originals which have been filed subsequently are all dated **04.02.2021**.

46. Alternatively, the learned Senior Counsel would submit that if the Award has been signed *post facto*, the correct date ought to have been given in the Award and that date is the date of recording limitation for the purpose of Section 7 of the UK Arbitration Act, 1996. In this connection, the learned



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Senior Counsel drew attention to Section 54 of the UK Arbitration Act, 1996,

which reads as under:-

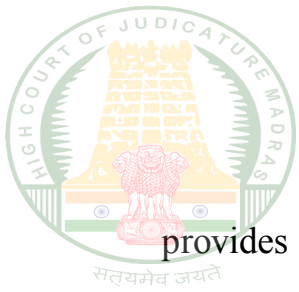
“54.Date of award.

(1) Unless otherwise agreed by the parties, the tribunal may decide what is to be taken to be the date on which the award was made.

(2) In the absence of any such decision, the date of the award shall be taken to be the date on which it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last of them.”

47. For this purpose, a reference was made to FOSFA 81 at Clause 32 (AT 41) which provides that all cases other than those which are agreed to take place in Malaysia are to be governed by the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Association Limited. Even as per Section 4(1) of the English Arbitration Act, 1996, the mandatory provisions are provided in Schedule I and Section 4 (2) of the Act which allows parties to make their own arrangement by Agreement for non-mandatory sections.

48. Similarly, Section 4(3) of the English Arbitration Act, 1996,

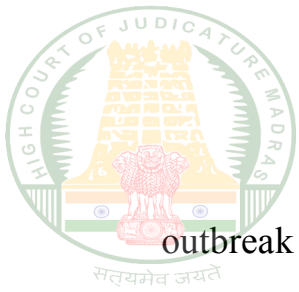


provides that such arrangement may be made by agreeing to the application of

WEB institutional Rules. Section 52 of the English Arbitration Act provides for Form of Award. As per Schedule I appended to Section 52 non-mandatory provision and therefore, Section 4 (2) and (3) can be reckoned from by parties making their own arrangements in terms of Section 52 (1) of the Act, which states that the parties are free to agree on the form of an Award. Section 52 (2) (5) will come into play only where the parties do not make such Agreement.

49. It is submitted that in this case, the parties agreed to institution rules of FOSFA as provided under Section 4 (3) read with 52 (1) of the English Arbitration Act, 1996. Rule 6 of the FOSFA Rules provide for "procedure for Arbitration Award", hence, the Award is to be in terms with the FOSFA Rules and not Section 52 (2) to (4) of The English Arbitration Act, 1996. However, it is contended by the Respondents/Award Debtors that it was not bound by the terms of the contract, including the arbitration clause and they could not be compelled to participate in the arbitration. Accordingly, the Respondents/Award Debtors did not participate in the arbitration proceedings.

50. The learned counsel further submitted that during March 2020 due to



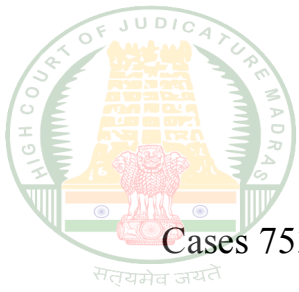
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outbreak of Covid-19 pandemic, the system of digital signing of Awards

electronically was introduced and it is also recognized under Section 7 (2) of the English Electronic Communications Act, 2000. The learned counsel for the petitioner therefore submitted that the Awards passed by the Arbitral Tribunal were strictly in accordance with FOSFA 81 and the Rules of Arbitration. It is submitted that the respective Awards were also in compliance with Section 47 of the said Act. Notwithstanding the same, an objection as regards maintainability of the Execution Petition was raised on the ground that the Award was not an original signed Award.

51. After considering the Awards as filed along with the certificates of the Arbitral Tribunal, this Court had overruled the objections of the Respondent/Award Debtor on **09.12.2021**.

52. Thereafter, the Respondents/Award Debtors filed counter in which, reference was made to Section 48 of the Arbitration and Conciliation Act, 1996. In order to buttress this submission, reliance was made to the decision of the Hon'ble Supreme Court in (i) **P.E.C. Limited Vs. Austbulk Shipping SDN BHD**, 2018 SCC Online 2549 and (ii) **Gemini Bay Transcription Private Limited Vs. Integrated Sales Services Limited**, (2022) 1 Supreme Court



Cases 753.

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53. The learned counsel for the Petitioner/Award Holder submitted that absence of a formal signed copy of the contract is not a *sine quo non* for initiating arbitration proceedings or it does not mean there was no agreed contract at all. It is submitted that Section 7(4)(b) of the Indian Arbitration and Conciliation Act, 1996, recognizes that an Arbitration Agreement can be derived from exchange of letters, telegrams or other modes of communications and an Arbitration Agreement need not be in a specified form.

54. It is submitted that incorporation of arbitration clause by general reference to a standard form of contract between the parties is a valid incorporation of arbitration clause. Section 7(5) of the Indian Arbitration and Conciliation Act, 1996 recognizes incorporation by reference and arbitration clause in another document would be deemed to be incorporated into the contract by reference, if the contract provides standard form of terms and conditions of an independent trade or professional institution.

55. The learned counsel for the Petitioner/Award Holder also invited the attention of this Court to the email dated **05.03.2020** of the Respondents/Award



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Debtors and contended that it confirmed that there was an Agreement for two

parcels of 4,000 Metric Tonnes on the vessel setting out the price for each shipment being US Dollar 779 and 755 respectively and this goes to show that there was an Agreement between the parties and the breach of the contract would entail initiation of arbitration proceedings.

56. The learned counsel for the Petitioner/Award Holder further submitted that the Arbitral Tribunal had afforded sufficient opportunities to the Respondents/Award Debtors to put for their defence, however, the Respondents/Award Debtors did not raise any defence before the Tribunal. The Tribunal, on appreciation of the material evidence concluded that there was a valid contract between the parties. The Arbitral Tribunal, on considering the facts leading to the dispute, the calculation of damage, mitigation etc., held that the Respondents/Award Debtors were in breach of the terms of the contract and proceeded to consider the claim for damages. Admittedly, the Respondents/Award Debtors did not challenge the Award passed by the Arbitrator and therefore, this Court need not go into the merits of the dispute, which has been decided by the Arbitral Tribunal.

57. According to the learned counsel for the Petitioner/Award Holder, the



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threshold for refusal to enforce a Foreign Award under Section 48 is so narrow

as compared to the grounds available for assailing an Arbitral Award under Section 34 of the Arbitration and Conciliation Act, 1996. In this context, reference was made to the decisions in (i) **Vijay Karia Vs. Prysmian Cavi E Sistemi SRL**, (2020) 11 Supreme Court Cases 1 (ii) **Ssangyong Engg & Construction Co Ltd., Vs. NHAI**, (2019) 15 Supreme Court cases 131 and (iii) **Reliance Industries Limited Vs. Union of India**, (2014) 7 Supreme Court Cases 603 to contend that the scope of interference under Section 48 is very narrow.

58. The learned counsel for the Petitioner/Award Holder also submitted that the Execution Petitions filed for enforcement of the Foreign Award dated **04.02.2021** is based on the established principles provided under law. The Award passed by the Arbitral Tribunal is not contrary to the public policy and it is enforceable against the Respondents/Award Debtors. The learned counsel for the Petitioner/Award Holder therefore prayed for allowing the Execution Petitions as prayed for.

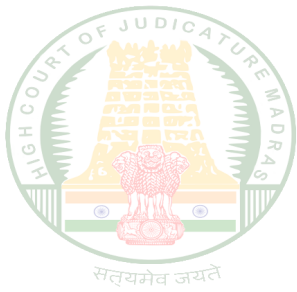
59. Turning to the submissions made under Section 47 (1) of the Act, the



learned Senior Counsel for Respondents/Award Debtors submitted that fulfillment of the same requires strict compliance and not substantial compliance. But in this case, the provisions of Section 47(1)(a) and 47(1)(b) have not been complied with which goes to the root of the Public Policy of the country. A failure to comply with those provisions renders a purported Foreign Award unenforceable. Therefore, notwithstanding the grounds raised under Section 48 of the Act, based on the preliminary objections raised on behalf of the Respondents/Award Debtors, the Execution Petitions deserves to be dismissed.

60. I have considered the arguments advanced by the learned counsel for the Petitioner/Award Holder and the learned Senior Counsel for the Respondents/Award Debtors and also perused the materials available on record.

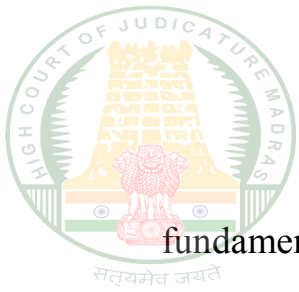
61. The Petitioner/Award Holder seeks to execute the foreign award dated **04.02.2021** passed by the Arbitral Tribunal under Federation of Oils, Seeds and Fats Association Limited (FOSFA) Rules. According to the Petitioner/Award Holder, in terms of the arbitration clause set out in the contract form - FOSFA 81 Rules, the dispute was referred to the Arbitral Tribunal and it is maintainable.



WEB COPY 62. The case was heard on **04.02.2024**, **11.01.2024** and thereafter on **14.02.2024**. After the counsel for the Petitioner/Award Holder has made previous submissions for enforcing the foreign award and to justify that the foreign award was to be recognized by this Court, it was felt that the Petitioner/Award Holder should first satisfy the requirements of Sections 47 and 48 of the said Act.

63. Aggrieved by the same, O.S.A. (CAD) Nos.81 and 82 of 2022 were filed. The Division Bench of this Court dismissed the appeals and directed the Respondents/Award Debtors to raise the issue of maintainability before this Court. It is therefore submitted that the Award is in compliance with Section 47 of the Act and the Execution Petition is maintainable.

64. In the Counter Affidavit, the Respondents/Award Debtors has raised two grounds namely (i) there is no valid and legally enforceable Arbitration Agreement between the parties as there was no contract between them and (ii) the Arbitral Tribunal assumed jurisdiction upon itself erroneously when there was no Arbitration Agreement and therefore, the Arbitral Tribunal has no jurisdiction and consequently, the Award passed is in contravention of



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fundamental policy of the laws of India. However, in the application under

WEB Section 48 of the Arbitration and Conciliation Act, the grounds raised by the Respondents/Award Debtors for setting aside the Award are not valid.

65. The learned counsel for the Petitioner/Award Holder contended that it was repeatedly harped upon by the Respondents/Award Debtors that there was no valid substantive contract between the parties and therefore, the arbitration proceedings as well as the present Execution Petitions are not maintainable.

66. In this context, the learned counsel for the Petitioner/Award Holder relied on **Enercon (India) Limited and others Vs. Enercon GMBH and another**, (2014) 5 Supreme Court Cases 1 wherein, it was held that Arbitration Agreement is a separate contract in the underlying contract between the parties and separation of the same from the main contract is essential to infer the intention between the parties to the dispute. In any event, such underlying contract does not extinguish the arbitration agreement.

67. The dispute between the Petitioner/Award Holder and the Respondents/Award Debtors had arisen on account of negotiation between the



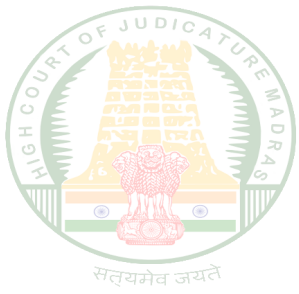
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Petitioner/Award Holder and the agents/brokers of the respective

Respondents/Award Debtors.

68. The Hon'ble Supreme Court in **Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd**, (2001) 6 SCC 356 has held that both recognition and enforcement of the Award under Part II of the Arbitration and Conciliation Act, 1996 can be in a single proceeding. Relevant passage from the said decision reads as under:-

“31. Prior to the enforcement of the Act, the Law of Arbitration in this country was substantially contained in three enactments namely (1) [The Arbitration Act, 1940](#), (2) [The Arbitration \(Protocol and Convention\) Act, 1937](#) and (3) [The Foreign Awards \(Recognition and Enforcement\) Act, 1961](#). A party holding a foreign award was required to take recourse to these enactments. The Preamble of the Act makes it abundantly clear that it aims at to consolidate and amend Indian laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The object of the Act is to minimize supervisory role of court and to give speedy justice. In this view, the stage of approaching court for making award a rule of court as required in [Arbitration Act, 1940](#) is dispensed with in the present Act. If the argument of the Respondents is accepted, one of the objects of the Act will be frustrated and defeated. Under the old Act, after making award and prior to execution, there was a procedure for filing and making an award a rule of court i.e. a decree. Since the object of the act is to provide speedy and alternative solution of the dispute, the same procedure cannot be insisted under the new Act when it is advisedly eliminated. If separate proceedings are to be taken, one for deciding the enforceability of a foreign award and the other thereafter for execution, it would only

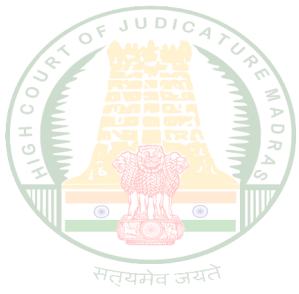


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contribute to protracting the litigation and adding to the sufferings of a litigant in terms of money, time and energy. Avoiding such difficulties is one of the objects of the Act as can be gathered from the scheme of the Act and particularly looking to the provisions contained in [Sections 46 to 49](#) in relation to enforcement of foreign award. In para 40 of the Thyssen judgment already extracted above, it is stated that as a matter of fact, there is not much difference between the provisions of the 1961 Act and the Act in the matter of enforcement of foreign award. **The only difference as found is that while under the Foreign Award Act a decree follows, under the new Act the foreign award is already stamped as the decree. Thus, in our view, a party holding foreign award can apply for enforcement of it but the court before taking further effective steps for the execution of the award has to proceed in accordance with [Sections 47 to 49](#).** In one proceeding there may be different stages. In the first stage the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. **Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/decreed again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from objectives contained in para 4 of the Statement of Objects and Reasons, [Sections 47 to 49](#) and Scheme of the Act that every final arbitral award is to be enforced as if it were a decree of the court. The submission that the execution petition could not be permitted to convert as an application under [Section 47](#) is technical and is of no consequence in the view we have taken. In our opinion, for enforcement of foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make rule of the court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the court enforcing a foreign award can deal with the entire matter. Even otherwise, this procedure does not prejudice a party in the light of what is stated in para 40 of the Thyssen judgment.**



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69. Under Part II of the Arbitration and Conciliation Act, 1996, Court is not sitting as an Appellate Court. The Court is merely required to see whether the successful Award Holder has complied with the requirements of Section 44 read with Article I of the First Schedule of the Arbitration and Conciliation Act, 1996 particularly Article II(2) read with Section 47 of the Arbitration and Conciliation Act, 1996.

70. The scope of interference in enforcement of the Foreign Award is very limited as held by the Hon'ble Supreme Court in **PEC Limited Vs. Austbulk Shipping SDN BHD**, (2019) 11 SCC 620.

71. If the Award is pursuant to an Agreement in writing for arbitration to which the convention set forth in the First Schedule is specified and the successful Award Holder also specifies the requirement of Section 47 of the Arbitration and Conciliation Act, 1996, the Award has to be not only recognized but also enforced.

72. Section 48 of the Arbitration and Conciliation Act, 1996 specifies the circumstances under which enforcement of Foreign Award may be refused.



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They are in two categories namely under Section 48(1) and Section 48(2) of the

Arbitration and Conciliation Act, 1996. For the purpose of discussion, they are

reproduced below:-

Section 48(1) of the Arbitration and Conciliation Act, 1996	Section 48(2) of the Arbitration and Conciliation Act
(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that- (a) The parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding	(2) Enforcement of an arbitral award may also be refused if the court finds that- (a) The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or (b) The enforcement of the award would be contrary to the public policy of India. <u>Explanation 1.</u> - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, - (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 of section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. <u>Explanation 2.</u> - For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. (3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.



Section 48(1) of the Arbitration and Conciliation Act, 1996	Section 48(2) of the Arbitration and Conciliation Act
on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.	

73. The law on the subject has also been clarified by the Hon'ble Supreme Court in the case of **Gemini Bay Transcription (P) Ltd., Vs. Integrated Sales Service Ltd.**, (2022) 1 SCC 753 and in the case of **Ssangyong Engg & Construction Co Ltd., Vs. NHAI**, (2019) 15 Supreme Court cases 131 and the issue is no longer *res integra*.

74. Initially, there was a proposal for purchase of Crude Palm Oil from the Petitioner/Award Holder by the Respondent/Award Debtor in **E.P.No.68 of 2021** namely **M/s.Manickavel Edible Oils Private Limited**. The Purchase Orders were negotiated on behalf of the Respondents/Award Debtors by two different agents/brokers namely **Mr.Ramamoorthy (HUF)** and **M/s.A Square Agencies** for **2000 Metric Tonnes** and **6000 Metric Tonnes** respectively. The confirmation was given by the said these two agents/brokers on **13.01.2020**. The price was however to be negotiated. Rest of the terms had been agreed upon. These Purchase Orders appear to have preceded with WhatsApp



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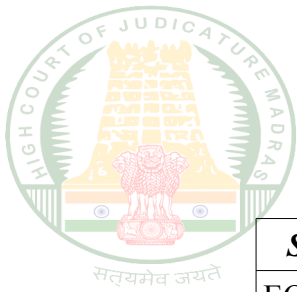
Communications from the Petitioner/Award Holder requesting the Respondents/Award Debtors to buy Crude Palm Oil from the Petitioner/Award Holder.

75. In furtherance of the aforesaid confirmation by the two agents/brokers, the Petitioner/Award Holder had also forwarded copies of draft contracts both dated 13.01.2020.

76. The draft contracts dated 13.01.2020 are for sale to the Respondent/Award Debtor in E.P.No.68 of 2021 namely **M/s.Manickavel Edible Oils Private Limited**. The draft contracts that were emailed on 20.01.2020 were also signed by the Petitioner/Award Holder on 02.03.2020.

77. The above draft contracts which were emailed by the Petitioner/Award Holder on 20.01.2020 to the Respondent/Award Debtor in E.P.No.68 of 2021 namely **M/s.Manickavel Edible Oils Private Limited** gave the details of the sale contract number, quantity and the price etc., as below:-

<i>Sale Contract No.</i>	<i>Quantity</i>	<i>Price</i>
EO/S/00257/20	2,000.000 Metric Tonnes (+/- 2.00% at sellers option on contract price)	To be price in due course (For CIF delivered weight) CFR Tuticorin, India.



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<i>Sale Contract No.</i>	<i>Quantity</i>	<i>Price</i>
EO/S/00246/20	6,000.000 Metric Tonnes (+/- 2.00% at sellers option on contract price)	To be price in due course (For CIF delivered weight) CFR Tuticorin, India.

78. The Respondent/Award Debtor in E.P.No.68 of 2021 namely M/s.Manickavel Edible Oils Private Limited, however did not sign the contracts. Under the above draft contracts that were emailed with signature, the Respondent/Award Debtor M/s.Manickavel Edible Oils Private Limited was required to open a Letter of Credit in favour of the Petitioner/Award Holder. The draft contracts which were emailed on 20.01.2020 contains two important clauses regarding arbitration. Both are identical. The preamble to the contracts read as under:-

“This contract is made upon the terms, conditions and rules, including the arbitration clauses of this contract, in contract form FOSFA 81 Rules of Arbitration and Appeal in force at the date of this contract, of which the parties admit that they have knowledge and notice, and the details given below shall be taken as having been written into such contract form in the appropriate place. Any special terms and conditions contained herein and/or attached hereto shall be treated as if written on such contract form and shall prevail in so far as if writer of such contract form and shall prevail in so far as they may be inconsistent with the printed clauses of such contract form.”

79. Similarly, an Arbitration Clause has also been provided in these two



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draft contracts. They read as under:-

WEB COPY Arbitration Clause:

Any dispute arising out of or under this contract, including any question regarding its existence, validity or termination shall be referred to International Arbitration Centre in accordance with the terms and conditions as per PORAM contracts. It is also understood and accepted that these contract terms and conditions once agreed are final and that there will not be any changing and negotiating rewards.”

80. The Petitioner/Award Holder had identified the vessel for shipping the Crude Palm Oil pursuant to the aforesaid negotiations by the agents/brokers of the Respondent/Award Debtor in E.P.No.68 of 2021. The Petitioner/Award Holder has also confirmed that the consignments will be shipped in vessel sub “YUE YOU 902 OOS”.

81. By a communication dated 20.02.2020, the Petitioner/Award Holder had confirmed the following:

“P.S.- Please note and furnish the following to Olam

- Firstly, Tuticorin has been as the final destination per your confirmation.*
- Secondly, to provide Shipping Instructions (including B/L splits per disport & BL consignee & notify party) and send us transmitted LC copy.*

Before vessel berth. Fyi, your shipping instructions provided are back to back to our shipper via an LC open to them 14 days before vessel eta

loadport. Just for your understanding, we will not be



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responsible for any delay should the COO unable to mention loadport BL no. as required by

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Your new policy as well as last minute changes to LC amendment needed to our shipper. Amendment charges will be borne by you.

Therefore, your corporation is greatly appreciated for future shipments with SI to be given by 14 days before vessel eta loadport.

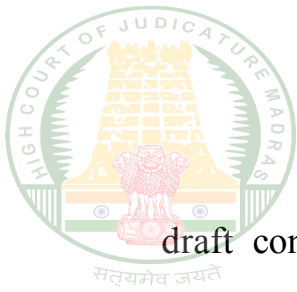
- Thirdly, ensure Marine Insurance/FOG is added to LC price.

Rgds, Bel."

82. However, on 27.02.2020, a revised quantum was given by the two agents/brokers of the Respondent/Award Debtor in E.P.No.68 of 2021. The consignment was split into two consignments of 4000 Metric Tonnes each for the Petitioner/Award Holder in E.P.Nos.68 and 69 of 2021 as detailed below:-

E.P.No.68 of 2021					
Agent Name	Contract No.	Seller	Buyer	Quantity	Price
Deepa Ramakrishnan for A Square Agencies	ASQ/Olam/M E/01C/19-20 (Final)	M/s.Olam International Ltd	Manickavel Edible Oils Pvt. Ltd.	4,000 MT (+/-) 2%	USD 755.00 CNF Tuticorin
E.P.No.69 of 2021					
Agent Name	Contract No.	Seller	Buyer	Quantity	Price
Ramakrishnan Padmanabhan HUF	PRAM HUF/Olam/M E/01B/19-20 (Final)	M/s.Olam International Ltd	Yentop Manickam Edible Oils Pvt. Ltd.	4,000 MT (+/-) 2%	USD 755.00 CNF Tuticorin

83. Pursuant to the above, the Petitioner/Award Holder reformatted the contracts that were earlier mailed on 20.01.2020 and sent a fresh copy of the



E.P.Nos.68 and 69 of 2021

draft contracts on 02.03.2020. It specified the same contract numbers as

mentioned above save that they were split between the Respondents/Award

Debtors in E.P.Nos.68 and 69 of 2021. The details of the contracts are as

under:-

E.P.No.68 of 2021						
Agent/ Broker	Sales Contract No.	Product/ Commodity	Seller	Buyer	Quantity	Price
A Square Agencies	EO/S/0024 6/20	Crude Palm Oil in Bulk	Olam Inter -national Limited	Manickavel Edible Oils Pvt. Ltd	4,000.00 Metric Tonnes (+/- 2.00% at seller's option on contract price)	USD 779.00 per Metric Tonne CNF Tuticorin
E.P.No.69 of 2021						
Agent/ Broker	Sales Contract No.	Product/ Commodity	Seller	Buyer	Quantity	Price
P.Rama krishnan HUF	EO/S/0025 7/20	Crude Palm Oil in Bulk	Olam Inter -national Limited	Yentop Manickam Edible Oils Pvt. Ltd.	4,000.00 Metric Tonnes (+/- 2.00% at seller's option on contract price)	USD 755.00 per metric tonne CNF Tuticorin

84. The draft contracts which were signed on 02.03.2020 has neither been signed by the representative of the Petitioner/Award Holder nor by the



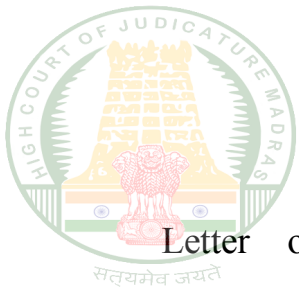
E.P.Nos.68 and 69 of 2021

Respondents/Award Debtors or their agents/brokers. After the transmission of the draft contracts on 02.03.2020, the draft contracts were sent to the same person namely Mr.Ramamoorthy (HUF).

85. By email dated 06.03.2020, the Petitioner/Award Holder requested the agent/broker Mr.Ramamoorthy, to arrange for the Letter of Credit without delay as the vessel had already reached the load port and would be berthing by 07.03.2020 and therefore, the Petitioner/Award Holder required the Letter of Credit copy with its Banker.

86. Prior to the aforesaid email dated 06.03.2020 requesting for the Letter of Credit, the agent/broker namely Mr.Ramamoorthy of M/s.A Square Group/Agencies had agreed to furnish the Letter of Credit for 725.83 on the ground that the Respondents/Award Debtors had opened the Letter of Credit for *bunga lavender* and taken a notional value of 767.50 for Letter of Credit opening while the Respondents/Award Debtors later covered at 690.

87. In the aforesaid email from 05.03.2020, there is a forward of email from mail@yentop.com purportedly sent by one person who identified himself as Annachi, beside Ramamoorthy of Annachi giving particulars of the proposed



E.P.Nos.68 and 69 of 2021

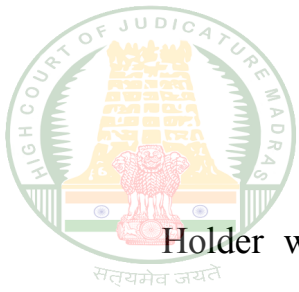
Letter of Credit in favour of the Petitioner/Award Holder. The

Respondents/Award Debtor however failed to open the Letter of Credit in favour of the Petitioner/Award Holder.

88. The Petitioner/Award Holder however appears to have loaded the consignments on 10.03.2020 on the vessel. The Master of the vessel also issued separate Bill of Lading No.YYPDGTUT02. Thus, without signing the contract and without Letter of Credit from the Respondents/Award Debtors, the Petitioner/Award Holder loaded the consignments in the vessel for the Respondents/Award Debtors hoping that the Respondents/Award Debtors will open the Letter of Credit by the time the consignment reaches the port of destination at Tuticorin.

89. During the interregnum, there was a complete lockdown due to outbreak of Covid-19 pandemic in India. The vessel appears to have arrived the port of destination/port of discharge namely Tuticorin on 17.03.2020. The Respondents/Award Debtors failed to take the delivery of consignments and the secured payments.

90. According to the Petitioner/Award Holder, the Petitioner/Award



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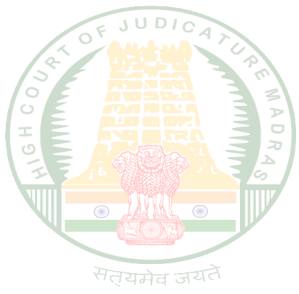
Holder was forced to make distress sale of the consignment to M/s.Adani

WEB COPY Wilmar Limited (AWL) and therefore, issued two separate notices on 24.03.2020 terminating the contract with the respective Respondents/Award Debtors.

91. In the aforesaid letters terminating the contract, the Petitioner's Legal Department stated that the Petitioner/Award Holder holds the respective Respondents/Award Debtors liable for the loss including the interest and costs while reserving all rights in respect of the contracts.

92. Later, by two separate notices dated 11.06.2020, the Petitioner/Award Holder has invoked the arbitration clause and nominated Ms.Diane Golloway, Little Eden, The Heath Hatfield Heath, Essex CM22 7DX, United Kingdom, as the Nominee Arbitrator and called upon the respective Respondents/Award Debtors to nominate an Arbitrator to resolve the dispute.

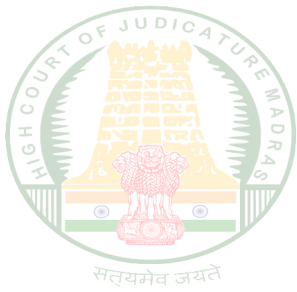
93. In the aforesaid letter/email issued by the counsel for the Petitioner/Award Holder namely Helmsman LLC also sought to persuade the Respondents/Award Debtors to consent for appointment of Ms.Diane Golloway as a Sole Arbitrator within 30 days from the date of the aforesaid notice.



WEB COPY 94. On 11.06.2020, the Petitioner/Award Holder invoked arbitration clause and nominated Ms.Diane Golloway. Threatened by the invocation of the arbitration clause by the Petitioner/Award Holder, the Respondents/Award Debtors filed O.S.Nos.56 and 65 of 2020 before the Sub Court, Virudhunagar. In respect of the respective contracts along with the suits, the Respondents/Award Debtors also filed application for interim injunction.

95. It is in this background, the Respondents/Award Debtors had proceeded to file O.S.Nos.56 and 65 of 2020 before the District Court at Virudhunagar. The reliefs sought for in these suits are as under:-

O.S.No.56 of 2020	O.S.No.65 of 2020
a) pass a judgment and decree against the defendant declaring that the purported contract bearing number EO/S/00246/20 dated 13.01.2020 is fraudulent, invalid and unenforceable in law against the plaintiff; and b) permanent injunction restraining the defendant and their men, agents, representatives and assigns, from enforcing the above purported contract of sale dated 13.01.2020 recorded allegedly in long form contract number EO/S/00246/20 c) Costs of the suit	a) pass a judgment and decree against the defendant declaring that the purported contract bearing number EO/S/00257/20 dated 13.01.2020 is fraudulent, invalid and unenforceable in law against the plaintiff; and b) permanent injunction restraining the defendant and their men, agents, representatives and assigns, from enforcing the above purported contract of sale dated 13.01.2020 recorded allegedly in long form contract number EO/S/00257/20 c) Costs of the suit



E.P.Nos.68 and 69 of 2021

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96. In these two suits, the Respondents/Award Debtors have also filed applications for interim injunction to restrain them from proceeding further with the actions on the basis of impugned Contract No.EO/S/00246 and impugned Contract No.EO/S/00257 both dated 13.01.2020 against the Petitioner/Award Holder till the disposal of the main suit and also to grant an ad-interim *ex parte* injunction to the above effect till the disposal of the petitions.

97. It appears that after invoking the Arbitration Clause 32 of Form 81 of the FOSFA, the Petitioner/Award Holder also invoked jurisdiction of the PORAM, Malaysia.

98. Parallely, the Petitioner/Award Holder had also invoked jurisdiction of the Arbitral Tribunal in Malaysia namely the Palm Oil Refiners Association of Malaysia (PORAM).

99. Under these circumstances, after filing the suits, the Respondents/Award Debtors issued an interim response to the Petitioner's/Award Holder's counsel on 09.07.2020 and requested the



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Petitioner/Award Holder to wait for 12 weeks time to issue proper reply in view

of lockdown imposed in India. Thereafter, the Respondents/Award Debtors

filed O.S.Nos.56 and 65 of 2020. In the above suits, the Petitioner/Award

Holder filed an application to stay the suits and also filed an application to refer

the parties to arbitration in terms of Section 45 of the Arbitration and

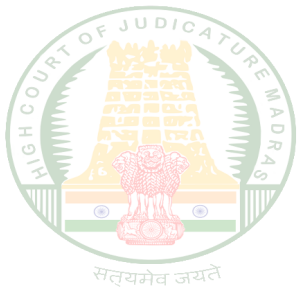
Conciliation Act, 1996.

100. As mentioned above, in the discussion part of this order, the arbitration clause if applicable to the dispute will apply. In case there is a consensus for arbitration between the parties, the arbitration has to be in accordance with the PORAM Rules of Arbitration and Appeal read with Clause 32 of Form 81 of FOSFA International. Relevant Clause reads as under:-

“32. Arbitration:

Where both parties at or subsequent to the date of the contract agree, any dispute arising out of or in connection with this contract shall be submitted to arbitration in Malaysia in accordance with the Arbitration Act of Malaysia, 1952 (as revised in 1972) and in accordance with the PORAM Rules of Arbitration and Appeal in force at the date of the contract.

In all other cases, any dispute arising out of the contract, including any question 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,



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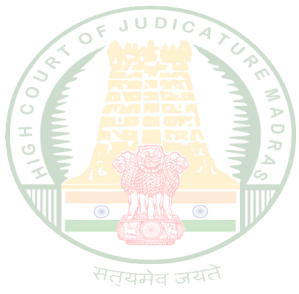
E.P.Nos.68 and 69 of 2021

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 order 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 governing the dispute, 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 may be), shall be 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.”

101. Thus, the Petitioner/Award Holder has approached two forums for resolving the dispute through arbitration. One before FOSFA international and the other before PORAM Tribunal in Malaysia.

102. In the letter/communication dated 17.07.2020, the Petitioner/Award Holder also made it clear that its position is that the suits instituted in O.S.Nos.56 and 65 of 2020 by the Respondents/Award Debtors constituted a breach of the arbitration agreements between the parties vide email dated 01.10.2020 of the Legal Counsel of the Petitioner/Award Holder.

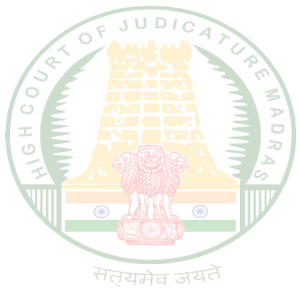


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WEB COPY 103. After the notice was issued on the Respondents/Award Debtors pursuant to the institution of the suits on 23.07.2020, the notice regarding institution of the suits to the Petitioner/Award Holder was also sent by the Respondents/Award Debtors.

104. In this background, the counsels engaged by the Petitioner/Award Holder has sent a letter to the Registrar of PORAM, Malaysia to await for further orders of the District Court at Virudhunagar in O.S.Nos.56 and 65 of 2020.

105. As mentioned above, the Petitioner/Award Holder had also initiated arbitration proceedings before the PORAM Tribunal and on receipt of notice from the Respondents/Award Debtors regarding the pendency of O.S.Nos.56 and 65 of 2020 vide letters/notices dated 26.08.2020, the Petitioner/Award Holder requested the Registrar of PORAM, Malaysia to put the arbitration proceedings on hold for a period of sixty days up to/including 30.11.2020 and referring from appointing an Arbitrator on behalf of the parties to constitute an Arbitral Tribunal.



WEB COPY 106. Parallely, the Petitioner/Award Holder had been persuading PORAM Tribunal to constitute an Arbitral Tribunal and to proceed further.

107. The emails indicate that the Petitioner/Award Holder also had marked copy of the communication dated 17.07.2020 addressed to the Registrar of FOSFA to constitute an Arbitral Tribunal. Similarly, the email was directly sent to the PORAM Tribunal indicating that the Respondents/Award Debtors had failed to appoint an Arbitrator.

108. Since the Respondents/Award Debtors had failed to nominate their arbitrator, the PORAM Tribunal has intimated the Respondents/Award Debtors by their communication on 05.08.2020 regarding nomination of Mr.Toeh Beng Chuan as the Nominee Arbitrator and on behalf of the Respondents/Award Debtors in accordance with the provisions of the FOSFA Rules of Arbitration and Appeal.

109. The Registrar of FOSFA in turn appointed Mr.Paul Davies as the Presiding Arbitrator by a communication dated 09.10.2020. Thus, two parallel proceedings were initiated by the Petitioner/Award Holder against the



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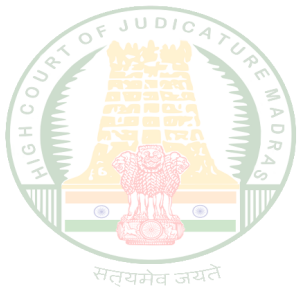
Respondents/Award Debtors so far before the two forums namely, the Tribunal

as per the PORAM Rules of Arbitration and appeal and another in accordance with the FOSFA Rules of Arbitration and Appeal at London.

110. The Petitioner/Award Holder has also given ambiguous indications by writing letters to the PORAM to refrain from constituting the Tribunal by communication dated 01.10.2020, in response to letter of Chief Executive Officer of PORAM dated 01.10.2020.

111. Thus, having considered the facts and the objections and the decisions of the parties, it has to be held that there was no Agreement within the meaning of Section 44 read with Article I of the First Schedule of the Arbitration and Conciliation Act, 1996. There was no Agreement in writing for referring the dispute for Arbitration.

112. The Award passed by the Arbitral Tribunal also indicates that there is hardly any discussion on the documents filed before the Arbitral Tribunal. The Arbitral Tribunal has merely accepted the Petitioner/Award Holder versions and has proceeded to pass the impugned Award. The content of which has been extracted above.



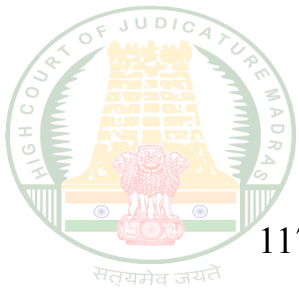
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113. In absence of a binding nature of contract either in the form of written agreement or written contract (in a communication in form of exchange of communications/letters) it cannot be said that there was a binding contract for referring the dispute to arbitration.

114. That apart, the Petitioner/Award Holder has invoked the jurisdiction of two forums one before the FOSFA and the other before the PORAM and has sent confusing messages to the Respondents/Award Debtors.

115. The Petitioner/Award Holder has also requested the PORAM Tribunal to refrain from constituting the Tribunal in view of O.S.Nos.56 and 65 of 2020 before the Sub Court, Virudhunagar.

116. Though Paragraph 5.11 of the Impugned Award also states that the Respondents/Award Debtors have initiated suits before the Sub Court, Virudhunagar, the Petitioner/Award Holder has merely stated that it was in breach of the Arbitration Agreement and did not want the Arbitral Tribunal to give a finding on the issue.



117. The Arbitral Tribunal ought to have given a finding on this issue before proceeding to pass the Award which is sought to be enforced by the Petitioner/Award Holder.

118. The alacrity shown in securing the Award from the Arbitral Tribunal during Covid-19 pandemic period was unnecessary and unwarranted. It shows the desperation of the Petitioner/Award Holder to resort to subterfuge by confusing the Respondents/Award Debtors.

119. Section 48(1)(b) of the Arbitration and Conciliation Act, 1996 also makes it clear that the enforcement of the Award may be refused if the parties are unable to present their case. In this case, the travel to the Foreign location itself was restricted during Covid period when the Arbitral Clause was invoked under the aforesaid so called unsigned Agreement dated 13.01.2020. The fact that the suits were filed by the Respondents/Award Debtors and were pending makes it clear that the Respondents/Award Debtors could not have proceeded further by participating in the Arbitration proceedings.

120. The Petitioner/Award Holder has also filed applications before the Sub Court, Virudhunagar in the above suits for dismissing the suits. However,



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without awaiting for further orders of the Court, the Petitioner/Award Holder has proceeded in a hurry to secure favourable Awards which are neither proper nor speaking Awards.

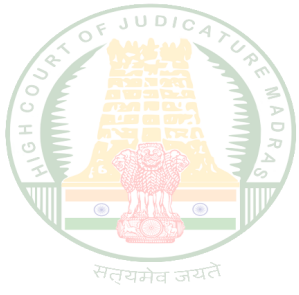
121. In my view, the Impugned Award is clearly contrary to the Public Policy of India/is in conflict with the Public Policy of India as the Award was induced by playing fraud on the Respondents/Award Debtors. It is also in conflict with the most basic notions of morality and justice.

122. In view of the above discussion, the Execution Petitions filed by the petitioner are liable to be dismissed and are accordingly dismissed leaving open to the Petitioner/Award Holder to initiate appropriate proceedings to recover the alleged loss suffered from the Respondents/Award Debtors on account of oral contract between the Petitioner/Award Holder and the Respondents/Award Debtors.

28.08.2024

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

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C.SARAVANAN, J.

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28.08.2024