2020 INSC 345

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.667 OF 2012

NATIONAL AGRICULTURAL COOPERATIVE MARKETING FEDERATION OF INDIA ... APPELLANT

VERSUS

ALIMENTA S.A. ... RESPONDENT

J U D G M E N T

ARUN MISHRA, J.

1. The question involved in the present appeal is the enforceability of the foreign award. The main objections for its enforceability are (i) whether NAFED was unable to comply with the contractual obligation to export groundnut due to the Government's refusal?; (ii) whether NAFED could have been held liable in breach of contract to pay damages particularly in view of Clause 14 of the Agreement?; and (iii) whether enforcement of the award is against the public policy of India?

2. The NAFED and the Alimenta S.A. entered into a contract for the supply of 5,000 metric tonnes of Indian HPS groundnut (for short, "commodity"). Clause 11 of the contract provided that terms and conditions would be as per FOSFA, 20 Contract, a standard form of

contract which pertains to the CIF contract. The contract entered into was not a Free on Board (FOB) contract.

3. NAFED was a canalizing agency for the Government of India for the exports of the commodity. For any export, which is to be carried forward to next year from the previous year, NAFED required the express permission and consent of the Government of India, being a canalizing agency. The said agreement was entered into by NAFED with the Alimenta S.A. at the rate of USD 765 per metric tonnes (Free on Board). The contract was for the season 1979-80. With the contracted quantity of 5000 metric tonnes, only 1900 metric tonnes could be shipped. The remaining quantity could not be shipped due to damage caused to crop by cyclone etc. in the Saurashtra region. The agreement dated 12.1.1980 was the first agreement. The transaction was governed by covenants such as Force Majeure and Prohibition contained in Clause 14 of the Agreement, whereby in case of prohibition of export by executive order or by law, the agreement would be treated as cancelled.

4. On 3.4.1980, NAFED executed a second Agreement with the Alimenta S.A. to export 4,000 metric tonnes of the commodity at the rate of USD 770 per metric tonnes. The shipment period for both the contracts was August-September, 1980. The second Agreement dated 3.4.1980 is not the subject matter of dispute in the appeal.

5. In August 1980, NAFED shipped only 1900 metric tonnes of commodity in receipt to the first Agreement. The balance stocks of 3100 metric tonnes of commodity could not be shipped as scheduled, due to the Government restrictions.

6. In the year 1980-81, there was crop failure in the United States of America due to which price of commodity rose high in the course of the season. Yet another addendum was executed to First Agreement on 18.8.1980, whereby the period of shipment of the commodity was changed to November-December, 1980 for balance 3100 metric tonnes under the disputed first Agreement.

7. On 8.10.1980, second Addendum to first Agreement came to be executed between the parties for supply of 3100 metric tonnes of the commodity. It was agreed that the commodity would be shipped during the 1980-81 season packed in new double gunny bags with the buyers paying the extra cost of USD 15 per metric tonnes.

8. It is pertinent to mention that NAFED had the permission of the Government of India to enter into exports for three years between 1977-80 but had no permission under the Export Control Order to carry forward the exports for the season 1979-80 to the year 1980-81. At the time of execution of the Addendum, NAFED claimed it was unaware of the said situation of not having requisite authority to enter into the Addendum.

9. On 21.11.1980, the NAFED intended to perform the first Addendum in the oblivion of the fact that it had no permission under the Export Control Order to carry forward the export for the season 1979-80 to the next year 1980-81. Being a Canalizing agency for the Government of India, NAFED couldn't carry forward the supply for the subsequent year. NAFED approached the Government of India to grant permission.

10. The Ministry of Agriculture, Government of India, vide letter dated 1.12.1980 directed NAFED not to ship any leftover quantities from previous years. It was made clear that the export of commodities was restricted under a quota system and that NAFED could not carry forward the previous years' commitment to the subsequent year. The commitment entered into by NAFED was objected to. Apart from that, the price of the commodity had escalated thrice than the prevailing price within one year. *Inter alia*, for the aforesaid reasons, the Government of India asked NAFED not to implement the previous year contract. It was for a particular season.

11. On 6.12.1980 and 9.12.1980, NAFED again requested the Government of India to allow the release of quota in the current season to fulfil its commitments under the contracts. The Government did not grant permission. The NAFED informed Alimenta S.A. not to

nominate the vessel for shipment of the crop due to the Government of India's prohibition to supply the contracted quantity.

12. The Alimenta S.A. on 29.12.1980 treated the telex message dated 20.12.1980 sent by NAFED as a notice of default made to make the supply. The Government of India finally rejected NAFED's request to allow export against previous year's contract vide communication dated 27.01.1981 because of the restricted export policy and quota ceiling. Alimenta S.A. on 5.2.1981 granted the last opportunity to NAFED to give the final offer, otherwise, the dispute would be referred to arbitration, and their nominee would be Mr. A.G. Scott. Accordingly, NAFED was asked to appoint its arbitrator.

13. On 13.2.1981, NAFED informed Alimenta S.A. that the export of the contracted quantity was not possible because of the Government of India's executive action banning such exports.

14. Ultimately, Alimenta S.A. filed arbitration proceedings before the Federation of Oil, Seeds and Fats Associations Ltd. (FOSFA), London on 13.2.1981. NAFED was asked to appoint an Arbitrator within 21 days. Alimenta S.A. vide telex dated 18.2.1981 requested to provide the originals of the Government notices banning the export and the dates on which they were confirmed. NAFED sent to Alimenta S.A. by its telex vide letter dated 23.2.1981 the Government of India’s order prohibiting export and also requested to provide it a copy of the

FOSFA Arbitration Rules, which was provided by Alimenta S.A. to NAFED on 24.2.1981. The NAFED requested for extension of time for appointing Arbitrator on 5.03.1981, which was extended on 10.3.1981.

15. NAFED filed petition bearing OMP No.41 of 1981 on 19.3.1981 against Alimenta S.A. and their Arbitrators before the High Court of Delhi. Prayer was made restraining Alimenta S.A. and FOSFA from continuing the arbitration proceedings *inter alia* on the ground that agreement did not contain any specific provision for arbitration. On 20.3.1981, the High Court stayed the arbitration proceedings till 22.4.1981. NAFED intimated the order of stay by its telex dated 23.3.1981 to Alimenta S.A.

16. In utter disregard of the order of interim stay granted on 20.3.1981 by the High Court, the FOSFA by its telex requested NAFED to appoint Arbitrator on its behalf by 20.4.1981, failing which FOSFA would appoint an arbitrator on behalf for NAFED.

17. On 9.4.1981, NAFED by telex message through their counsel informed FOSFA that it had no jurisdiction to proceed with the arbitration in view of the order of stay by the High Court and any action taken by Alimenta S.A. or by Mr. Scott of FOSFA would be illegal and void. On 22.4.1981, the matter came up before the High Court of Delhi. The counsel on behalf of the Alimenta S.A. was

granted four weeks to file a reply; the case was adjourned to 27.7.1981. The interim order of stay was accordingly extended till 21.7.1981.

18. However, in disregard of the order passed by the High Court, FOSFA appointed Mr. F.A.D. Ralfe as an Arbitrator on behalf of the NAFED on 23.4.1981. Thus, the NAFED urged that it was deprived of the right to appoint its nominee Arbitrator. The NAFED vide its letter dated 1.5.1981 informed FOSFA that despite the order of stay by the High Court, contumacious steps were taken to appoint the Arbitrator on its behalf and it was further stated that the counsel appearing for Alimenta S.A., stated in the Court that Alimenta S.A. would not proceed further in the arbitration. Ultimately, NAFED filed proceedings in the nature of contempt on 30.10.1981 on the ground that appointment of Arbitrator on behalf of the NAFED violated the orders passed by the High Court dated 20.3.1981 and 22.4.1981.

19. The Delhi High Court decided the said OMP No.41 of 1981 wherein it held that First Agreement would be governed by arbitration agreement incorporated in FOSFA 20 Contract while there was no arbitration agreement between the parties in so far as the Second Agreement was concerned. On 22.3.1982, Alimenta S.A. filed FAO (OS) No.24 of 1982 against the order dated 11.12.1981, the same was later withdrawn. Alimenta S.A. filed a special leave petition before this

court on 1.4.1982, which was numbered as Civil Appeal No.1755 as against the order dated 11.12.1981 of the High Court. This court passed the order on 30.4.1982, restraining Alimenta S.A. and FOSFA to proceed further in the arbitration. On 4.5.1982, FOSFA sent a telex that this court had no power to act in the matter nor to stay the arbitration and continued with the proceedings in violation of the order passed by this Court.

20. NAFED on 9.1.1984 sought a clarification from the Government of India as to whether the direction given by the Ministry of Agriculture not to make the supply was lawful and binding. Ministry of Commerce, Government of India, stated that directions issued by the Ministry of Agriculture refusing fulfilment of previous years contract was a lawful direction and, as such, was binding on NAFED.

21. Ultimately, this court vide judgment and order dated 9.1.1987 upheld the decision of the High Court dated 11.12.1981. Concerning the First Agreement, the parties were relegated to pending arbitration, while for the Second Agreement, as there was no arbitration clause, the parties were relegated to the civil proceedings.

22. On 10.1.1989, NAFED filed its written submission before the FOSFA, pointing out that it was not allowed to appoint its arbitrator despite specific order of restraint by the High Court and it was not allowed to be represented through its counsel. Alimenta S.A. also filed

additional written submissions on 19.6.1989 before FOSFA. Ultimately, FOSFA passed an award on 15.11.1989 by which NAFED was directed to pay a sum of USD 4,681,000 being the difference between the contract price of USD 765 per metric tonnes plus USD 15 per metric tonnes for double bags and the settlement price of USD 2275 per metric tonnes plus USD 15 per metric tonnes for double bags as damages. The amount was ordered to be paid with interest at the rate of 10.5% per annum from 13.2.1981 till the date of the award.

23. Being aggrieved by the award, NAFED filed an appeal before the Board of Appeal on 16.1.1990, however, on 13.5.1990 and 30.5.1990 multiple requests were made by M/s. Clyde and Co. (solicitor firm) to represent NAFED before the Board of Appeal, considering there were special circumstances and Indian law was required to be explained. The Board of Appeals rejected the request by NAFED to be represented through its Solicitors on 14.5.1990.

24. Ultimately, the Board of Appeal on 14.9.1990 while deciding the appeal compounded NAFED's issues by enhancing the award, whereas Alimenta S.A. filed no appeal. NAFED was directed to pay interest components at the rate of 11.25% instead of 10.5% p.a. The interest was enhanced in the absence of an appeal by Alimenta S.A. The Arbitrator nominee of Alimenta S.A., who passed the award,

represented the case on behalf of the Alimenta S.A. before the Board of Appeal.

25. The Alimenta S.A. filed a petition as Suit No.1885 of 1993 under sections 5 and 6 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (for short, "the Foreign Awards Act") seeking enforcement of the initial as well as appellate award passed by the FOSFA and Board of Appeal.

26. NAFED filed objections to the enforceability of the award, on the ground that it was opposed to the public policy as such unenforceable. There was non-compliance with the provisions contained in section 7(1)(a), (b), and (c) of the Foreign Awards Act. No notice under section 101 of the Multi State Cooperative Societies Act was given. The execution was also barred by limitation. It ought to have been filed within 30 days because of Article 119 of Schedule I of the Limitation Act, 1963, and the period of three years was not available to seek its enforcement. The learned Single Judge of the High Court decided the matter against the appellant - NAFED and decided the same finally after 20 months of delay on 28.1.2000 after hearing the matter and held the award to be enforceable. A review was sought, which was dismissed on 5.5.2000. After that, NAFED filed an appeal bearing F.A.O. (O.S) No.205 of 2000 before the Division Bench of the Delhi High Court. The High Court entertained it on 28.2.2001 and stayed

the execution. The interim order and the order of appointment was questioned before this Court. This Court modified the interim order of the High Court dated 28.2.2001 and disposed of both the petitions of Alimenta S.A. on 5.4.2002 while passing certain interim orders.

27. On 9.9.2002, Alimenta S.A. filed an execution petition No.204 of 2002 seeking execution of the decree on 28.1.2000 passed in Suit No.1885 of 1993 in the High Court. The appeal was ultimately held to be not maintainable. It was dismissed on 6.9.2010 on the ground of non-maintainability. The NAFED questioned the decision in the appeal. On 24.11.2010, NAFED filed the present appeal (bearing Civil Appeal No.667 of 2012) for adjudication on merits. There are subsequent developments that are the subject matter of other appeals.

28. Shri Shyam Diwan and Shri Rana Mukherjee, learned senior counsel argued that enforcement of the award is barred by section 7(1)(a)(ii) of the Foreign Awards Act. The award is against the public policy of India on numerous grounds and thus is unenforceable under section 7(1)(b) of the Foreign Awards Act. The award/ decree does not deal with the restriction imposed by the Government of India as to the export of the commodity. Award flouts the basic norms of justice. The enforcement of such an award would result in the unjust enrichment of Alimenta S.A. at the cost of the very survival of the appellant organisation. The enforcement procedure is barred by limitation. The

same was not brought within 30 days in terms of Article 119, Schedule I of the Limitation Act, 1963. The learned Single Judge could not have converted the award into a decree. The learned Single Judge awarded interest at the rate of 18 percent per annum; besides, in case there is exchange deviation by way of loss, NAFED would be required to make good such loss. NAFED was not given due opportunity to present its case by the Arbitral Tribunal. Arbitrator-nominee of Alimenta S.A. represented case on behalf of Alimenta S.A. before the Board of Appeal, award was unfair, and enhancement of interest in the absence of appeal was also illegal. The decision is contrary to the public policy of India as laid down in various decisions.

29. *Per contra*, Mr. C.A. Sundaram, learned senior counsel appearing on behalf of the respondent argued the scope of interference in the enforcement of the foreign award is limited. The award is not against public policy. The due opportunity was given to the NAFED to present its case in the arbitration proceedings. The question of imposition of ban by the Government was gone into by the Arbitral Tribunal, and conclusion was recorded that it was a self-imposed restriction by NAFED. There was no such ban on the export by the Government of India. Because of the findings recorded by the Arbitral Tribunal, it would not be open to this Court to go into its correctness. It was open to the Board of Appeal to award the interest in the absence of an

appeal by the Alimenta S.A. Learned Single Judge had the jurisdiction to award the interest while passing decree. There is no bar for the Arbitrator to appear in the appeal on behalf of the respondent.

30. We first deal with the main submission raised concerning whether NAFED was unable to carry out contractual obligation in view of Government's refusal to export, as such the contract became void and unenforceable in view of Clause 14 of FOSFA agreement. Consequently, NAFED could not have been held liable to pay damages.

31. The argument has to be appreciated in the background of the fact that NAFED was a canalizing agency for the Government of India for the year 1978-1981. For the export to be carried forward from the previous years, NAFED required express permission and consent from the Government of India. The first agreement was executed on 12.1.1980 for the supply of the commodity for the season 1979-80. A total of 5,000 metric tonnes were to be exported. However, undisputedly only 1900 metric tonnes could be shipped. Addendum was executed on 18.8.1980 to supply a balance of 3100 metric tonnes in November-December, 1980. Subsequently, on 6.10.1980, another addendum was executed, and it was agreed that the commodity would be shipped during the 1980-81 season. The NAFED had permission from the Government of India to enter into export for three years, i.e., between the period 1977-80 but had no permission under the Export

Control Order to carry forward the export for the season 1979-80 to the year 1980-81. NAFED claimed that it was unaware of the said fact that it did not have the requisite authority to enter into the addendum dated 6.10.1980. Be that as it may. The fact remains that the Government of India's permission was required to carry forward the export for the season 1979-80 to the year 1980-81 under the Export Control Order, which was not given. When it was again sought for, it was specifically refused by the Government of India on various grounds.

32. Clause 14 of the FOSFA, 20 Contract dated 12.1.1980, entered between the parties is significant in this regard. The relevant Clauses 14, 18, and 20 are extracted hereunder:

> "**EXTRACTS OF RELEVANT CLAUSES OF FOSFA 20 CONTRACT DATED 12-01-1980 BETWEEN PETITIONER AND RESPONDENT**
>
> 14. **PROHIBITION**: In the event, during the shipment period of prohibition of export of any other executive or legislative act by or on behalf of the Government of the country of origin or of the territory where the port/s or shipment named herein is/are situate, or of blockade or hostilities, restricting export, whether partially or otherwise, any such restriction shall be deemed by both parties to apply to this contract and to the extent of such total or partial restriction to prevent fulfilment whether by shipment or by any other means whatsoever and to that extent this contract of any unfulfilled portion thereof shall be extended by 30 days.
>
> In the event of shipment during the extended period still proving impossible by reason of any of the causes in this Clause, the contract or any unfulfilled part thereof shall be cancelled. Sellers invoking that Clause shall advice Buyers with due dispatch. If required, Sellers must produce proof to justify their claim for extension or cancellation under the clause.

> 18.**DOMICILE:** This contact shall be deemed to have been made in England, and the construction, validity, and performance thereof shall be governed in all respect by English Law. Any dispute arising out of or in connection therewith shall be submitted to arbitration in accordance with the Rules of the Federation. The serving of proceedings upon any party by sending same to their last known address together with leaving a copy of such proceedings at the officers of the Federation shall be deemed good service, rule of law or equity to the contrary notwithstanding.
>
> 20.**ARBITATION:** Any dispute arising out of this 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 Oil, Seeds and Fats Associations Limited, in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant.
>
> Neither party hereto, nor any persons claiming under either of them shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal (as the case may be) in accordance with the Rules of Arbitration and Appeal of the Federation and it was 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 a condition precedent to the right of either party hereto or 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."
>
> (emphasis supplied)

It is apparent from Clause 14 of the Agreement that during the contract shipment period in the event of the prohibition of export by an executive or legislative act by any of the Government of origin, such restriction shall be deemed by both the parties to apply to the contract. Thus, if the shipment becomes impossible by reasons mentioned in the clause, the agreement shall be cancelled.

33. The Government of India, Ministry of Agriculture and Irrigation wrote a letter on December 1, 1980, to the Managing Director of the

NAFED in which it pointed out that it was undesirable to make the supply in the current season at the rate of previous years contract and apart from that no exporter could undertake to export any commodity with such a wide variation in prices. It was also pointed out that the export contract of last year is not supposed to be carried forward automatically to next year. The export of the commodity was restricted under a quota system. NAFED could not agree on its own to move forward last year's commitment to the current year without prior approval of the Government. Therefore, NAFED was asked not to consider taking up the previous year's contract for implementation in the current crop season and inform it to the Government. Para 2 of the letter is extracted hereunder:

> "2. I am told that NAFED could not fulfil some of the contracts for exports last year due to drought in the country. It has been further reported to me that some move is being made to export HPS groundnuts during the current season against the contracts entered into last year. This will be a most undesirable thing to do considering that the prices today are almost three time than the prices prevalent last year. No exporter can undertake to export any commodity with such a wide variation in prices. Moreover the export contracts for last year are not supposed to be carried forward automatically to the next year. Further the export of HPS groundnuts is restricted and under a quota system, NAFED cannot on its own carry forward last year's commitments to the current year without getting the prior approval of the Govt. You may, therefore confirm that NAFED is not considering taking up last year's contracts for implementing in the current crop season."

34. After that, NAFED requested the Government of India again to release quota in the current season to fulfil commitment under the

contract for previous year. On 6.12.1980 and 9.12.1980, letters were written to the Ministry of Commerce. The NAFED wrote a letter on 9.1.1981 to the Government. The Government vide letter dated 27.1.1981 in reply to the letter dated 9.1.1981 reiterated that it was not desirable to permit last year's commitment in the current year. The letter dated 27.1.1981 is extracted hereunder:

"No.26021/180-T
Government of India
Ministry of Agriculture
(Department of Agriculture & Cooperation)
(Trade Division)

Krishi Bhawan, New Delhi
Dated the 27th Jan. 1981

To,

Shri S.K. Iyer,
Executive Director (Foreign Trade),
Sapna Building,
54, East of Kailash,
N.A.F.E.D.,
P.B. No.3580.

Subject:- Export of HPS Groundnut – Last years pending contracts – reg.

Sir,

I am to invite a reference to your letter No.HO/CSC/EXP/HPS/POI/ 80-81/1334 dated 9th Jan., 1981 on the above subject and to say that the question of allowing the last year's contracts of HPS Groundnuts during current season has been again examined carefully. In view of the restricted export policy of this item and quota ceiling etc. it has not been considered desirable to permit the last year's commitments in the current year.

Yours faithfully,

Sd/-
(P.C. Ramrakhian)
Director (Trade)"

(emphasis supplied)

35. The refusal by the Government came in the way of the NAFED to affect the supply by exporting the commodity to Alimenta S.A. This was covered within clause 14 of the Agreement mentioned above. The prohibition was on account of the Government's refusal.

36. It is apparent from the provisions of the contract dated 12.1.1980 that the quantity of 5,000 metric tonnes, to be increased up to 8,000 metric tonnes, depending upon the availability of stocks. Clause 8 of the Agreement dated 12.1.1980 provided that shipment was to be from Saurashtra port at the buyer's option during February/March/April 1980. The other terms and conditions were as per FOSFA, 20 contract terms. Addenda dated 18.8.1980 and 6.10.1980 were executed to the agreement/ contract dated 12.1.1980. The NAFED had no authority to enter into export for the previous years without prior permission of the Government of India, and it executed both the addenda without such permission.

37. The Minutes of Meeting of Business Committee of NAFED, dated 21.11.1980 at Agenda Item No.4, notes that there were unseasonable rains in the Saurashtra region and due to cyclone, etc. the groundnut crop was severely damaged, and there was less production. There was less than 50% recovery. There was an escalation of prices as compared to 1978-79 in 1979-80. It appears that NAFED intended to perform

the contract in the oblivion of the fact that being a canalizing agent, it could not have carried out the supply in the next subsequent years.

38. The NAFED in the circumstances after receipt of the letter dated 1.12.1980 of the Department of Agriculture informed the Alimenta S.A. not to nominate the vessel for shipment for the goods due to the Government's prohibition for the supply of the goods. The NAFED wrote a letter again on 9.1.1981 and pointed out to the Government that they were unable to export on account of Government order. The Government was asked to apprise it of the final decision regarding the export of commodities to the respondent. Letter dated 27.1.1981 reiterating prohibition came to be issued in the aforesaid circumstances. It was taken to be a refusal to supply on the part of the NAFED by the Alimenta S.A., and they asked the NAFED to appoint its Arbitrator. Alimenta S.A. appointed Mr. A.G. Scott as its nominee Arbitrator. Another telex dated 13.2.1981 was sent by the NAFED informing that it would not be possible to supply the commodity because of Government action of banning such export. Later on, confirmation was sought from the Government by the NAFED. The Ministry of Commerce, Government of India, informed NAFED on 9.1.1984 that the directions issued by the Ministry of Agriculture refusing fulfilment of previous year's contract were lawful

and binding. The letter of the Government dated 9.1.1984 is extracted hereunder:

"VINOD RAI
DEPUTY SECRETARY

January 8, 1984

To,
Managing Director,
The National Agricultural Cooperative
Marketing Federation of India Limited,
Sapna Building 54, East of Kailash,
New Delhi – 110024

Subject: Execution of HPS Groundnuts Season 1980-81, Non-fulfilment of Contract entered into During 1979-80 Crop Season under 1979-80.

Dear Sir,

Please refer to your letter No. HO/OSC/HPS/POL/PO-81/1337 dated the 9th January, 1984, on the above subject.

2. The Ministry of Commerce allocated to NAFED, as the same canalizing agency for HPS Groundnuts, 50,000 tonnes for export during the crop season 1980-81. Kindly refer to the letter from Joint Secretary Usha Vohra dated 21st October, 1980, to Shri Shrivastava. This quota was for the new contracts to be entered into that season at the prevailing market prices. NAFED were not entitled to use any part of the quota to fulfil the previous years contracts. Furthermore, I must advice you, as you certainly know, that you could not have utilized any unused part of the quota for the previous year to fulfil old contracts.

3. Ministry of Agriculture notified you that permission for you to fulfil the previous year's contracts was refused. This was a lawful directions which you were bound to obey. However, even without this express direction you could not have fulfilled these contracts. You would have needed from Ministry of Commerce an additional export quota covering the quantities required. You applied for additional quota generally and this application was refused in view of the prevailing market conditions both internally and externally. Most certainly no additional quota would have been granted to enable you to fulfil old contracts at the previous season's prices.

Yours faithfully

(VINOD RAI)
Deputy Secretary to the Government of India"

It is apparent that the Government of India issued a direction that was binding upon the NAFED. Without permission, it was not possible for the NAFED to carry out its obligation under the Contract and Addenda.

39. It was argued that in common law, frustration does not rescind the contract *ab initio*, it brings the contract to an end forthwith, without more and automatically, in the sense that it releases both the parties from any performance of the contract while leaving undisturbed any legal rights already accrued or payments already made in accordance with its term. It was further argued that the law later developed through subsequent decisions wherein it was laid down that advance payments made were recoverable by a party. The decision *in Davis Contractor Ltd v. Fareham Urban District Council* (1956) 2 All ER 145 by Lord Radcliffe is relied upon wherein the test applied for the frustration of the contract is whether there is a radical change in the obligation. It observed:

> "… Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for **would render it a thing radically different** from that which was undertaken by the contract… there must be as well such a

> change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."
>
> (emphasis supplied)

40. It was also argued that the House of Lords expressly upheld frustration in the later cases in *Tsakiroglou & Co. Ltd. v. Noblee & Thorl GmbH*, [1961] 2 All ER 179; *Ocean Tramp Tankers Corporation v. V/O Sovfracht*, [1964] 1 All ER 161; *National Carriers Ltd. v. Panalpina (Northern) Ltd*, [1981] 1 All ER 161; *Pioneer Shipping Ltd. & Ors. v. BTP Tioxide Ltd.; The Nema,* (1981) 2 All ER 1030; *Paal Wilson & Co. A/S v. Partenreederei Hannah Blumenthal; The Hannah Blumenthal,* [1983] 1 All ER 34.

41. Reliance has also been placed on *National Carriers Ltd. v. Panalpina (Northern) Ltd.* [1981] 1 All ER 161 wherein Lord Simon observed:

> "Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/ or the obligations from what the parties could **reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances;** in such a case the law declares the parties to be discharged from further performance."
>
> (emphasis supplied)

42. Learned senior counsel argued that as there was frustration, the contract determined automatically; it could not be continued by affirmation. The appellant has also placed reliance on the decision in

Delhi Development Authority vs. Kenneth Builders & Developers Private Limited and Ors., (2016) 13 SCC 561 wherein the court held that the contract of Kenneth Builders with the DDA stood frustrated and made impractical to perform because of the prohibition imposed on any construction activity being undertaken on the project land. The Court observed :

> **"30.** The interpretation of Section 56 of the Contract Act came up for consideration in *Satyabrata Ghose* v. *Mugneeram Bangur & Co.*, AIR 1954 SC 44. It was held by this Court that the word "impossible" used in Section 56 of the Contract Act has not been used in the sense of physical or literal impossibility. It ought to be interpreted as impracticable and useless from the point of view of the object and purpose that the parties had in view when they entered into the contract. This impracticability or uselessness could arise due to some intervening or supervening circumstance which the parties had not contemplated. However, if the intervening circumstance was contemplated by the parties, then the contract would stand despite the occurrence of such circumstance. In such an event, "there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens". This is what this Court had to say: (AIR pp. 46-49, paras 9-10 & 17)
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> > "*9.* The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment.
> >
> > This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.

10. Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility.

The parties shall be excused, as Lord Loreburn says: (*F.A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.* (1916) 2 AC 397 (HL) AC p. 406)

'… If substantially the whole contract becomes impossible of performance or in other words *impracticable* by some cause for which neither was responsible.'

* * *

17. It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in *Matthey* v. *Curling*, (1922) 2 AC 180 (HL): (AC p. 234)

'… a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King's enemies … or *vis major*.'

This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does not come at all within the purview of Section 56 of the Contract Act cannot be accepted."

36. On a conspectus of the facts and the law placed before us, we are satisfied that certain circumstances had intervened, making it impracticable for Kenneth Builders to commence the construction activity on the project land. Since arriving at some clarity on the issue had taken a couple of years and that clarity was eventually and unambiguously provided by the report of CEC, it could certainly be said that the contract between DDA and Kenneth Builders was impossible of performance within the meaning of that word in Section 56 of the Contract Act. Therefore, we reject the contention of DDA that the contract between DDA and Kenneth Builders was not frustrated."

43. In the present case, parties have agreed, and in Clause 14 of the Agreement, it was contemplated that during the contract if there is any prohibition of the export or any other executive or legislative Act by or on behalf the Government of the Country of origin, the unfulfilled part of the contract shall be cancelled. Because of the refusal by the Government, it was not permissible to the NAFED to make a supply to the Alimenta S.A. Hence; the unfulfilled part was required to be cancelled. Thus, NAFED was justified in not making the supply as it would have violated the Export Control Order, and it was not permissible to carry forward the quantity of the previous year to the next year because of the Export Control Order without permission of the Government.

44. It is apparent that the contract came to an end in terms of Clause 14 of the Agreement. The contract became void in view of the provisions contained in Section 32 of the Indian Contract Act, 1881 (for short, "Contract Act"). The stipulation in Clause 14 releases both parties from the performance of the contract.

45. Section 32 of the Contract Act provides for enforcement of contingent contracts. Section 32, along with illustrations, is reproduced hereunder:

> "32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened."

If the event becomes impossible, such contracts become void.

Illustrations

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse."
(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void."

46. Section 56 of the Contract Act deals with the agreement to do an impossible act or to do acts afterward become impossible or unlawful. It also provides for liability of the promisor to do something which he knew or might have known with reasonable diligence an act which is impossible or unlawful; as such, the promisor must make compensation for the non-performance of the promise.

47. Section 32 of the Contract Act applies in case the agreement itself provides for contingencies upon happening of which contract cannot be carried out and provide the consequences. To this case, provisions of Section 32 of the Contract Act is attracted and not section 56. In case an act becomes impossible at a future date, and that exigency is not provided in the agreement on the happening of which exigency, impossible or unlawful, the promisor had no control which he could not have prevented, the contract becomes void as provided in section 56. However, section 56 also provides liability for a cause where the promisor has agreed to do something which he knew

or with reasonable diligence might have known and which the promisee did not know to be impossible or unlawful. Such a promisor must make compensation to such promise and is liable to pay damages. The latter part of section 56 is applicable when promisee did not know the act to be impossible or unlawful and that it was not known to the promisor; the action was impossible or unlawful or with reasonable diligence might have known.

48. In the present case, because of the clear stipulation in Clause 14 of the Agreement, it is apparent that the parties have agreed for a contingent contract. They knew very well that the Government's executive, or legislative actions might come in the way as provided in Clause 14 of the Agreement. Thus, in this case, section 32 of the Contract Act is attracted and not the provisions of section 56. It was an agreement to do an act impossible in itself without permission, and that is declared to be void by section 32. The contract was capable of being performed in case the Government gave the requisite authorization. It is not an event that was not in contemplation at the time of entering into the agreement. Government permission was necessary. Section 56 is not attracted as the promisor and promisee both knew the reason in advance as in agreement such a contingency was provided itself in case of Government's executive order comes in the way, for cancellation of the contract. Thus, the contract became

void on the happening of the contingency, as provided in section 32 of the Contract Act.

49. This Court in *Satyabrata Ghose v. Mugneeram Bangur & Co.*, AIR 1954 SC 44, considered the applicability of sections 32 and 56 while considering the doctrine of frustration of contract. Impossibility and frustration are used as interchangeable expressions. The principle of frustration is an aspect of the discharge of a contract. In India, the only doctrine the courts have to go by is that of intervening impossibility or illegality as laid down in section 56, and the English decisions in this regard may have persuasive value but are not binding. This Court also considered if the contract contained impliedly or expressly a stipulation, according to which it would stand discharged on happening of particular circumstances. The dissolution of the agreement would take place under the terms of the contract itself. Such cases would be outside the purview of section 56 of the Contract Act altogether. They would be dealt with under section 32 of the Contract Act, which deals with contingent contracts. This Court held:

> **"9.** The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to the discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment.

This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible, but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do."

10. Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact, impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility.

The parties shall be excused, as Lord Loreburn says, see – Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd., 1916-2 AO 297 at p 403 (A).

> "If substantially the whole contract becomes impossible of performance or in other words *impracticable* by some cause for which neither was responsible."

In - *Joseph Constantine Steamship Line Limited* v. *Imperial Smelting Corporation Ltd.'*, 1942-AO 154 at p 168 (B) Viscount Maugham observed that the

> "doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made."

Lord Porter agreed with this view and rested the doctrine on the same basis.

The question was considered and discussed by a Division Bench of the Nagpur High Court in *Kesari Chand* v. *Governor-General-in-Council* ILR (1949) Nag 718 (C), and it was held that the doctrine of frustration comes into play when a contract becomes impossible of performance after it is made, on account of circumstances beyond the control of the parties. The doctrine is a special case of impossibility and, as such, comes under Section 56 of the Indian Contract Act. We are in entire agreement with this view which is fortified by a recent pronouncement of this Court in *Ganga Saran* v. *Ram Charan*, AIR 1952 SO 9 at p 11 (D) where Fazl Ali, J., in speaking about frustration observed in his judgment as follows:

> "It seems necessary for us to emphasise that so far as the courts in this country are concerned, they must look primarily to the law as embodied in Sections 32 and 56 of the Indian Contract Act, 1872."

We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening

impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also, that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law *dehors* these statutory provisions. The decisions of the English Courts possess only a persuasive value and may be helpful in showing how the Courts in England have decided cases under circumstances similar to those which have come before our courts.

15. These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word "impossible" in its practical and not literal sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

16. In the latest decision of the House of Lords referred to above, the Lord Chancellor puts the whole doctrine upon the principle of construction. But the question of construction may manifest itself in two totally different ways. In one class of cases the question may simply be, as to what the parties themselves had actually intended; and whether or not there was a condition in the contract itself, express or implied, which operated, according to the agreement of the parties themselves, to release them from their obligations; this would be a question of construction pure and simple and the ordinary rules of construction would have to be applied to find out what the real intention of the parties was.

According to the Indian Contract Act, a promise may be express or implied Vide Section 9. In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with under Section 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act. In the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole

> purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it.
>
> When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object – Vide Morgan v. Manser, 1947-2 All ER 666 (L). This may be called a rule of construction by English Judges but it is certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of Section 56 of the Indian Contract Act."

50. The Court followed the decision in *Satyabrata Ghose* (supra) in *Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, AIR 1968 SC 522, it held that if the contract contains implied or expressly a term according to which it would stand discharged on the happening of certain contingencies, dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56 of the Contract Act. Such cases have to be dealt with under section 32 of the Contract Act. The Court opined:

> "7. Such a difficulty has, however, not to be faced by the courts in this country. In *Ganga Saran* v. *Ram Charan*, 1952 SCR 36 = (AIR 1952 SC 9) this Court emphasized that so far as the courts in this country are concerned they must look primarily to the law as embodied in Section 32 and 56 of the Contract Act. In *Satyabrata Ghose* v. *Mugneeram*, 1954 SCR 310 = (AIR 1954 SC 44) also, Mukherjee, J. (as he then was) stated that Section 56 laid down a rule of positive law and did not leave the matter to be determined

> according to the intention of the parties. Since under the Contract Act a promise may be expressed or implied, in cases where the court gathers as a matter of construction that the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56. Although in English law such cases would be treated as cases of frustration, in India they would be dealt with under Section 32. In a majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from performance of the contract. The Court can grant relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was not contemplated by the parties at the date of the contract. There would in such a case be no question of finding out an implied term agreed to by the parties embodying a provision for discharge because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstances which is so fundamental as to be regarded by law as striking at the root of the contract as a whole occurs, it is the court which can pronounce the contract to be frustrated and at an end. This is really a positive rule enacted in Section 56 which governs such situations."

51. In *Boothalinga Agencies v. V.T.C. Poriaswami Nadar*, AIR 1969 SC 110 again the doctrine of frustration of contract came up for consideration. It was held that the provisions of section 56 of the Contract Act could not apply to self-induced frustration. The relevant portion is extracted hereunder:

> **"10.** The doctrine of frustration of contract is really an aspect, or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It should be noticed that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.
>
> **13.** In English law, therefore, the question of frustration of contract has been treated by courts as a question of construction depending upon the true intention of the parties. In contrast, the statutory provisions contained in Section 56 of the Indian Contract Act lay down a positive rule of law and English authorities cannot therefore

be of direct assistance, though they have persuasive value in showing how English courts have approached and decided cases under similar circumstances.

14. Counsel on behalf of the respondent, however, contended that the contract was not impossible of performance, and the appellant cannot take recourse to the provisions of Section 56 of the Indian Contract Act. It was contended that under clause 1 of the Import Trade Control Order No. 2-ITC/48, dated March 6, 1948 it was open to the appellant to apply for a written permission of the licensing authority to sell the chicory. It is not shown by the appellant that he applied for such permission and the licensing authority had refused such permission. It was therefore maintained on behalf of the respondent that the contract was not impossible of performance. We do not think there is any substance in this argument. It is true that the licensing authority could have given written permission for disposal of the chicory under clause 1 of Order No.2-ITC/48, dated March 6, 1948 but the condition imposed in Ex. B-9 in the present case is a special condition imposed under clause (*v*) of paragraph (*a*) of Order No.2-ITC/48, dated March 6, 1948 and there was no option given under this clause for the licensing authority to modify the condition of licence that "the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof will be sold to any party". It was further argued on behalf of the respondent that, in any event, the appellant could have purchased chicory from the open market and supplied it to the respondent in terms of the contract. There is no substance in this argument also. Under the contract the quality of chicory to be sold was chicory of specific description—"Egberts Chicory, packed in 495 wooden cases, each case containing 2 tins of 56 lb. nett". The delivery of the chicory was to be given by "S.S. Alwaki" in December, 1955. It is manifest that the contract, Ex. A-1 was for sale of certain specific goods as described therein and it was not open to the appellant to supply chicory of any other description. Reference was made on behalf of the respondent to the decision in *Maritime National Fish Limited* v. *Ocean Trawlers, Limited* 1935 AC 524. In that case, the respondents chartered to the appellants a steam trawler fitted with an otter trawl. Both parties knew at the time of the contract that it was illegal to use an otter trawl without a licence from the Canadian government. Some months later the appellants applied for licences for five trawlers which they were operating, including the respondents' trawler. They were informed that only three licences would be granted, and were requested to state for which of the three trawlers they desired to have licences. They named three trawlers other than the respondents', and then claimed that they were no longer bound by the charter-party as its object had been frustrated. It was held by the Judicial Committee that the failure of the contract was the result of the appellants' own election, and that there was therefore no frustration of the contract. We think the principle of this case applies to the Indian law and the provisions of Section 56 of the Indian Contract Act cannot apply to a case of "self-induced

> frustration". In other words, the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party. But for the reasons already given, we hold that this principle cannot be applied to the present case for there was no choice or election left to the appellant to supply chicory other than under the terms of the contract. On the other hand, there was a positive prohibition imposed by the licence upon the appellant not to sell the imported chicory to any other party but he was permitted to utilise it only for consumption as raw material in his own factory. We, are accordingly of the opinion that Counsel for the respondent has been unable to make good his argument on this aspect of the case."

52. In the present case, the High Court observed that it was a case of self-induced frustration. The High Court ignored and overlooked that it was not a case of frustration under section 56 of the Contract Act, but there was a stipulation in Clause 14 of the Agreement, the effect of which was ignored and overlooked, and the said term was based upon the law as applicable in India and was based on export restrictions, it was within the realm of public policy. The NAFED was a canalising agency and could not have supplied without prior permission of Government, nor could it have lawfully carried forward last year's supply to next year that too limited quota and to supply Government permission was necessary to make it. Enforcement of such an award in violation of export policy and the Government order would be against the public policy as envisaged in section 7 of the Act of 1961.

53. In *Ram Kumar v. P.C. Roy & Co. (India) Ltd.,* AIR 1952 Cal. 335 (338), parties were aware of the restrictions imposed by the

Government on the supply of wagons but expected normal conditions by the date of performance. Wagon restrictions continued till the date of performance, and there was a failure to supply. The Court held that the contract became void, being impossible of performance, and parties were relieved of their liabilities. In the present case also, parties knew that the Government may or may not grant permission and entered into the contract with the said stipulation. Thus, due to the Government not giving consent, it became incapable of performance, and therefore, NAFED could not have been fastened with the liability to pay the enforceable contract damages. In *Ram Kumar* (supra) High Court held:

> "20. Frustration depends on what has actually happened & its effect on the possibility of performing the contract. Where one party claims that there has been frustration & the other party contests it, the Court has got to decide the issue 'ex post facto' on the actual circumstances of the case.
>
> > "The data for decision are, on the one hand, the terms and construction of the contract, read 'n the light of the then-existing circumstances, and on the other hand the events which have occurred. It is the court which has to decide what is the true position between the parties."
>
> 'Denny Mott's' case, 1944 A. C. 265. Lord Sumner observed in the 'Hirji Mulji' case (1926) A. C. 497 that the legal effect of the frustration of the contract does not depend on the intention of the parties or their opinions or even knowledge as to the events which brought about the frustration but upon its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. In my view, this principle is applicable in this case.
>
> 23. The main object of the contract was the transhipment of the goods from Bihar to Bengal by Railway & in my opinion, having regard to the events that have happened the basis of the contract has been

> overthrown. In the absence of express intention of the parties, I have to determine what is just & reasonable in view of the non-availability of wagons for transport & the difficulties created by the restrictions or emergency orders. It may be now accepted as settled law that when people enter into a contract which is dependant for its performance on the continued availability of a specific thing & that availability comes to an end by reason of circumstances beyond the control of the parties; the contract is dissolved. According to Lord Wright, the expression 'frustration of the contract' is an elliptical expression. The fuller & more accurate expression is 'frustration of the adventure or of the commercial or practical purpose of the contract.' In my view, the commercial or practical purpose of this contract was defeated or overthrown by the refusal on the part of the Govt. to issue permit & by the non-availability of the transport facilities & the restrictions & embargoes put by the Govt. & ultimately by requisition of the stock of the plff. The real object of the contract as contemplated by the parties was the purchase or employment of the goods for a particular purpose & therefore, the doctrine of frustration can be imported & if necessary, the requisite terms can be implied."

54. In *Kunjilal Manohar Das v. Durga Prasad Debi Prosad*, AIR 1920 Cal. 1021 (1024), parties with full knowledge of the restrictions imposed by the Government entered into an agreement to send the goods by rail. They were aware of Government restrictions. However, the time when the performance of the contract arrived, the restrictions had not been removed. It was impossible for the seller to make delivery. In the circumstances, the Court held, that the contract became void and the seller was excused from performance thereof, and the buyer was held not entitled to recover any compensation from the seller, thus:

> "….The principle simply is this, that when you are having regard to the intention of parties at the time of entering into the contract, the lawyer is apt to make a mistake if he assumes that the intention of the contracting parties is to bring about a state of circumstances such that the legal remedy of damages will require to be resorted to, lawyers assuming that it will pervert the intention of commercial men in cases

> of this sort. That being so, and applying the principle that this contract was not a contract made indifferently for the sale of goods or for the payment of damages, but a contract for the delivery of goods, it seems to me that performance is, impossible, that the contract having been made upon the assumption that the normal state of things would have come into existence by March or April of this year, the intention of the contract would be perverted, if I was to hold that the sellers are to insure the buyers against this chance of the control of Government going on. For these reasons, I answer the questions which have been put to me in this way: *Firstly:*— Did, in the circumstances hereinbefore mentioned, such a contract become void and were the sellers excused from the performance thereof? My answer is, "yes," the contract became void before breach. *Secondly:* — Are the buyers entitled to recover any compensation from the sellers? I answer that "no," either in respect of goods which were lying ready at the up-country station which the railway company refused to accept for despatch or in respect of goods which were not so delivered. I answer "no" to both parts of the second question because the performance having become impossible, no tender could have had any effect upon the railway company.
>
> It is important in this case to add that this decision proceeds entirely upon the facts as given to me by agreement, not only the facts as regards the contract and the position of railway traffic but also the facts stated as regards the assumptions and intentions of the parties. When the latter class of facts is not the same, it is very probable that different considerations altogether will prevail."

55. In *Smt. Sushila Devi and Ors. v. Hari Singh and Ors.*, (1971) 2 SCC 288, this Court, while considering section 56, observed that the impossibility contemplated is not confined to something which is not humanly possible. If the performance of the contract became impracticable, which the parties had in view, then it must be held that the performance of the agreement had become impossible. The Court opined:

> "**11.** In our opinion, on this point, the conclusion of the appellate court is not sustainable. But in fact, as found by the trial court as well as by the appellate court, it was impossible for the plaintiffs to even get into Pakistan. Both the trial court as well as the appellate court have found that because of the prevailing circumstances, it was impossible for the

> plaintiffs to either take possession of the properties intended to be leased or even to collect rent from the cultivators. For that situation, the plaintiffs were not responsible in any manner. As observed by this Court in *Satyabrata Ghose* v. *Mugneeram Bangur and Co.*, (1954) SCR 310, the doctrines of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. The view that Section 56 applies only to cases of physical impossibility and that where this section is not applicable recourse can be had to the principles of English law on the subject of frustration is not correct. Section 56 of the Indian Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The impossibility contemplated by Section 56 of the Contract Act is not confined to something which is not humanly possible. If the performance of a contract becomes impracticable or useless, having regard to the object and purpose the parties had in view, then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract, and it should be of such a character that it strikes at the root of the contract."

In this case, 'expected event' was a refusal by the Government as agreed to under Clause 14 of the Agreement. On the happening of such an event, it is so fundamental as to be regarded by law as striking at the root. As such, we are of the opinion that the contract was rendered void in terms of section 32 of the Contract Act.

56. In *Narayana Chandrasekhara Shenoy and Bros. by sole Proprietor Narayana Shanbog v. R. Palaniappa Mudaliar*, AIR 1952 Mad. 670, a question arose whether the defendant was required to supply jaggery by rail, which became impossible by the issuance of a Government notification controlling the movement of jaggery by rail. The plaintiff refused to bear the additional expenditure entailed by the

change in the mode of transport. The Court held that even assuming that the contract had not become impossible of performance, the defendant did not commit a breach of the contract. In the instant case, export became impossible due to Government's refusal.

57. It would have been unlawful for NAFED to affect the supply in view of the Government's refusal to accord the permission, and both the parties knew it very well and agreed that the contract would be cancelled in such an exigency for non-supply in quantity. Thus, they were bound by the agreement. The award pre-supposes supply could have been made after the Government's refusal. If supply had been made, it would have been unlawful. Thus, the parties agreed for its cancellation as such an award is against the basic law and public policy as applied in India.

58. It is also apparent that the Government rightly objected to the supply being made at the rate of the previous season in the next season, particularly when the prices escalated thrice. The addendum was entered into subsequently, unfairly, and the parties fully understood that the Government would not permit export at the rate on which supply was proposed, and NAFED was acting only as a canalising agent of the Government of India. Thus, for such an unfair contract, permission was rightly declined by the Government. In the previous year, the commodity could not be supplied due to force

majeure. In no event, supply could have been made in December 1980 and January 1981 sans permission from the Government of India.

59. Next question arises whether the ground of prohibition to supply imposed by the Government was sufficient to render the award unenforceable in terms of the provisions contained in Section 7 of the Foreign Awards Act. Section 7 is extracted hereunder:

> **7.Conditions for enforcement of foreign awards** -
> (1) A foreign award may not be enforced under this Act---
>
> (a) if the party against whom it is sought to enforce the award proves to the court dealing with the case that----
>
> (i) the parties to the agreement 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
>
> (ii) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement:
>
> Provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
>
> (iv) 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
> (v) the award has not yet become binding 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; or
>
> (b) if the court dealing with the case is satisfied that----
> (i) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

> (ii) the enforcement of the award will be contrary to public policy.
>
> (2) If the court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority referred to in sub-clause (v) of clause (a) of sub-section (1), the court may, if it deems 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 furnish suitable security.**"**
>
> (emphasis supplied)

60. It is provided in Section 7(1) (b)(ii) that if the court dealing with the case is satisfied that the enforcement of the award will be contrary to public policy, the foreign award may not be enforced. The foreign award may also not be executed in the case as per section 7(1)(a)(i) if the parties to the agreement under the law applicable are under some incapacity or agreement is not valid under the law. Similar exigency is provided in section 7(i)(a)(ii) if proper notice of appointment of Arbitrator is not given or the party was unable to present its case. Section 7(1)(a)(iii) provides that if the award deals with the questions not referred or contains decisions on matters beyond the scope of the agreement renders award unenforceable. Section 7(1)(a)(iv) makes an award not capable of enforcement in case the composition of the Arbitration Tribunal or procedure is not in accordance with the agreement of the parties.

61. The question arises when the award can be said to be contrary to public policy. This Court considered the issue in several decisions. The expression "public policy" concerning the agreement relates to the

public policy of the country where award is being enforced. Section 23 of the Contract Act, 1872 deals with what consideration and objects are lawful and what not. If the court regards it as immoral or opposed to public policy, in that event, the consideration or object of agreement is said to be unlawful, and any agreement of which the object or consideration is unlawful is void.

62. In *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.* 1986 (3) SCC 156, the court observed that the Contract Act does not define the expression of public policy or opposed to public policy. The principles governing public policy are capable of expansion or modification.

63. In *Renusagar Power Co. Ltd. v. General Electric Co.,* 1994 Supp. (1) SCC 644, meaning of the expression "public policy" under section 7(1)(b) (ii) of the Foreign Awards Act came up for consideration and distinction drawn while applying the rule of public policy between the matter involving domestic law, and that involving conflict of laws was explained. The court considered that because of absence of a workable definition of 'international public policy' in Article V(2)(b) of New York Convention it is difficult to construe the expression "public policy" in Section 7(1)(b)(ii) and opined that the doctrine of public policy under the said provision would mean as the courts in India apply it. This Court held that enforcement of the foreign award would

be refused on the ground that it was contrary to public policy if such enforcement would be contrary to (1) fundamental policy of Indian Law, (2) the interest of India, and (3) justice or morality. The relevant portion is extracted hereunder:

> "**63.** In view of the absence of a workable definition of "international public policy," we find it difficult to construe the expression "public policy" in Article V(2)(*b*) of the New York Convention to mean international public policy. In our opinion, the said expression must be construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced. Consequently, the expression 'public policy' in Section 7(1)(*b*)(*ii*) of the Foreign Awards Act means the doctrine of public policy as applied by the courts in India. This raises the question whether the narrower concept of public policy as applicable in the field of public international law should be applied or the wider concept of public policy as applicable in the field of municipal law.
>
> **65.** This would imply that the defence of public policy which is permissible under Section 7(1)(*b*)(*ii*) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(*e*) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India," which follow the said expression, contravention of law alone will not attract the bar of public policy, and something more than contravention of law is required.
>
> **66.** Article V(2)(*b*) of the New York Convention of 1958 and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(*b*) of the New York Convention and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(*c*) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This

> would mean that "public policy" in Section 7(1)(*b*)(*ii*) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(*b*)(*ii*) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (*i*) fundamental policy of Indian law; or (*ii*) the interests of India; or (*iii*) justice or morality.
>
> **67.** Having examined the scope of public policy under Section 7(1)(*b*)(*ii*) of the Foreign Awards Act, we will now proceed to consider the various grounds on the basis of which the said provision is invoked by Renusagar to bar the enforcement for the award of the Arbitral Tribunal. As indicated earlier, Renusagar has invoked the said provision on the ground that enforcement of the award would be contrary to the public policy for the reason that such enforcement—
>
> (*a*) would involve contravention of the provisions of FERA;
>
> (*b*) would amount to penalising Renusagar for not disregarding the interim orders passed by the Delhi High Court in the writ petition filed by Renusagar;
>
> (*c*) would enable recovery of compound interest on interest;
>
> (*d*) would result in payment of damages on damages;
>
> (*e*) would result in unjust enrichment by General Electric;
>
> We will examine the submissions of learned counsel under each head separately."

64. In *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.,* (2003) 5 SCC 705, this Court opined that the phrase "Public Policy of India" in the Arbitration and Conciliation Act, 1996 under Section 34 (2) (b) (ii), with respect to domestic awards, should be given a wider meaning. The court observed:

> **"15.** The result is — if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered

under Section 34. However, such failure of procedure should be patent affecting the rights of the parties.

What meaning could be assigned to the phrase "Public Policy of India"?

16. The next clause which requires interpretation is clause (*ii*) of sub-section (2)(*b*) of Section 34, which among other things provides that the court may set aside the arbitral award if it conflicts with the "public policy of India." The phrase "public policy of India" is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of section and scheme of the Act. It has been repeatedly stated by various authorities that the expression "public policy" does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept "public policy" is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent, the court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act, and constitutional provisions.

30. It is true that under the Act, there is no provision similar to Sections 23 and 28 of the Arbitration Act, 1940, which specifically provided that the arbitrator shall pass award within reasonable time as fixed by the court. It is also true that on occasions, arbitration proceedings are delayed for one or other reason, but it is for the parties to take appropriate action of selecting proper arbitrator(s) who could dispose of the matter within reasonable time fixed by them. It is for them to indicate the time-limit for disposal of the arbitral proceedings. It is for them to decide whether they should continue with the arbitrator(s) who cannot dispose of the matter within reasonable time. However, non-providing of time-limit for deciding the dispute by the arbitrators could have no bearing on interpretation of Section 34. Further, for achieving the object of speedier disposal of dispute, justice in accordance with law cannot be sacrificed. In our view, giving limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice.

31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower

> meaning given to the term "public policy" in *Renusagar case*, 1994 Supp (1) SCC 644, it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:
>
> (*a*) fundamental policy of Indian law; or
>
> (*b*) the interest of India; or
>
> (*c*) justice or morality, or
>
> (*d*) in addition, if it is patently illegal.
>
> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

Additional tests were laid down. The expression 'patently illegal' was also held to be covered in public policy with respect to domestic awards. Illegality goes to the root of the matter, or if the award shocks the conscience of the court, it would be patently illegal. The intention of the party should be gathered from the agreement. It was observed that severe procedural defects in the arbitration proceedings might provide enough ground for refusal to uphold the award. In the instant case, we are not on the issue of procedural irregularities while considering the aspect above concerning the public policy; we have to consider the case mainly given Clause 14 of the Agreement.

65. In *Shri Lal Mahal Limited v. Progetto Grano Spa*, (2014) 2 SCC 433, the ratio of *Renusagar* (supra) was applied, and it was held that expression and concept of public policy of India are in its application is narrower in the enforcement of foreign award than in respect of the enforcement of domestic arbitral awards. Something more than

contravention of the law is required for refusal of enforcement of a foreign award on the ground that it is contrary to the public policy of India. This court further opined that the expression “public policy of India” in section 48 (2)(b) has the same import as that of expression “public policy” in section 7(1)(b)(ii) of the Foreign Awards Act. It further opined that errors of fact by Board of Appeal obtained by the appellant, relying on the report which was inconsistent with the terms of the contract would not bar enforceability of a foreign award on the ground of being contrary to the public policy of India and the court cannot look into the merits of the award at the stage of enforcement of the foreign awards, and observed:

> **“27.** In our view, what has been stated by this Court in *Renusagar,* 1994 Supp (1) SCC 644, with reference to Section 7(1)(*b*)(*ii*) of the Foreign Awards Act must apply equally to the ambit and scope of Section 48(2)(*b*) of the 1996 Act. In *Renusagar*, it has been expressly exposited that the expression "public policy" in Section 7(1)(*b*)(*ii*) of the Foreign Awards Act refers to the public policy of India. The expression “public policy” used in Section 7(1)(*b*)(*ii*) was held to mean "public policy of India." A distinction in the rule of public policy between a matter governed by the domestic law and a case involving conflict of laws has been noticed in *Renusagar*. For all this, there is no reason why *Renusagar* should not apply as regards the scope of inquiry under Section 48(2)(*b*). Following *Renusagar*, we think that for the purposes of Section 48(2)(*b*), the expression “public policy of India” must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to the public policy of India if it is covered by one of the three categories enumerated in *Renusagar*. Although the same expression “public policy of India” is used both in Section 34(2)(*b*)(*ii*) and Section 48(2)(*b*) and the concept of "public policy in India" is same in nature in both the sections but, in our view, its application differs in degree insofar as these two sections are concerned. The application of the "public policy of India" doctrine for the purposes of Section 48(2)(*b*) is more limited than the application of the same expression in respect of the domestic arbitral award.

> **29.** We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(*b*) only if such enforcement would be contrary to (*1*) fundamental policy of Indian law; or (*2*) the interests of India; or (*3*) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(*b*)(*ii*) in *Saw Pipes* is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(*b*).
>
> **47.** While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(*b*) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to: (*1*) fundamental policy of Indian law; or (*2*) the interests of India; or (*3*) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(*b*)."

66. In *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, the Court relied on the decision in *Renusagar* (supra) for interpreting the expression "public policy." The court held that the concept of the fundamental policy of Indian Law to mean (1) compliance of the statutes and judicial precedence, (2) need for judicial approach, (3) natural justice compliance, and (4) standards of reasonableness. The concept of justice and morality beside that of patent illegality on consideration of the various decisions, the court observed:

> **"18.** In *Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644, the Supreme Court construed Section 7(1)(*b*)(*ii*) of the Foreign Awards (Recognition and Enforcement) Act, 1961:
>
> "**7. *Conditions for enforcement of foreign awards***.—(1) A foreign award may not be enforced under this Act—
>
> * * *
>
> (*b*) if the Court dealing with the case is satisfied that—

* * *

(*ii*) the enforcement of the award will be contrary to the public policy."

In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to

(*i*) The fundamental policy of Indian law,

(*ii*) The interest of India,

(*iii*) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (*see* SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).

27. Coming to each of the heads contained in *Saw Pipes* [(2003) 5 SCC 705] judgment, , we will first deal with the head "fundamental policy of Indian law." It has already been seen from *Renusagar* [1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this, it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice."

40. We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(*b*), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground

(in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Denning, L.J. in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p Shaw*, (1952) 1 All ER 122: (All ER p. 130 D-E: KB p. 351)

> "Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means (*see* Statutes 9 and 10 Will. III, C. 15). At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in *Kent* v. *Elstob*, (1802) 3 East 18, that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in *Hodgkinson* v. *Fernie*, (1857) 3 CB (NS) 189, but is now well established."

67. In *Ssanyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)*, (2019) 8 SCALE 41, the Court concerning the public policy held:

> "23. What is clear, therefore, is that the expression "public policy of India," whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).
>
> 26. Insofar as domestic awards made in India are concerned, an additional ground is now available Under Sub-section (2A), added by

the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law," namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under "public policy of India," would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

31. Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Section 34(2)(a)(iii) and (iv) as applicable to the facts of the present case.

33. In *Renusagar* (supra), this Court dealt with a challenge to a foreign award Under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 ["Foreign Awards Act"]. The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["New York Convention"], which is almost in the same terms as Sections 34 and 48 of the 1996 Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India, the grounds for challenge/refusal of enforcement Under Sections 34 and 48, respectively, being the same. After referring to the New York Convention, this Court delineated the scope of enquiry of grounds Under Sections 34/48 (equivalent to the grounds Under Section 7 of the Foreign Awards Act, which was considered by the Court), and held:

> 34. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of Clauses (a) to (e) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition, and enforcement of the award would be refused if the Court was

satisfied in respect of matters mentioned in Clauses (a), (b) and (c). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (See Dicey & Morris, The Conflict of Laws, 11th Edn., Vol. I, p. 578). It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in Sub-clauses (a) to (e) of Clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in Sub-clauses (a) and (b) of Clause (2) of Article V None of the grounds set out in Sub-clauses (a) to (e) of Clause (1) and Sub-clauses (a) and (b) of Clause (2) of Article V postulates a challenge to the award on merits.

35. Albert Jan van den Berg in his treatise The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, has expressed the view:

> It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention, the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a Respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration." (p. 269)

36. Similarly Alan Redfern and Martin Hunter have said:

> The New York Convention does not permit any review on the merits of an award to which the Convention applies and, in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted." (Redfern & Hunter, Law and Practice of International Commercial Arbitration, 2nd Edn., p. 461.)

37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.

xxx xxx xxx

65. This would imply that the defence of public policy which is permissible Under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that Under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837(sic 1937) which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2) (b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria, it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such

enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

This judgment was cited with approval in Redfern and Hunter on International Arbitration by Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter (Oxford University Press, Fifth Ed., 2009) ["Redfern and Hunter"] as follows:

11.56. First, the New York Convention does not permit any review on the merits of an award to which the Convention applies. [This statement, which was made in an earlier edition of this book, has since been cited with approval by the Supreme Court of India in Renusagar Power Co. Ltd. v. General Electric Co. The court added that in its opinion 'the scope of enquiry before the court in which the award is sought to be enforced is limited [to the grounds mentioned in the Act] and does not enable a party to the said proceedings to impeach the Award on merits']. Nor does the Model Law.

The same theme is echoed in standard textbooks on international arbitration. Thus, in International Commercial Arbitration by Gary B. Born (Wolters Kluwer, Second Ed., 2014) ["Gary Born"], the learned author deals with this aspect of the matter as follows:

[12] No Judicial Review of Merits of Foreign or Non-Domestic Awards in Recognition Actions

It is an almost sacrosanct principle of international arbitration that courts will not review the substance of arbitrators' decisions contained in foreign or non-domestic arbitral awards in recognition proceedings. Virtually every authority acknowledges this Rule and virtually nobody suggests that this principle should be abandoned. When national courts do review the merits of awards, they labour to categorize their action as an application of public policy, excess of authority, or some other Article V exception, rather than purporting to justify a review of the merits.

[a] No Judicial Review of Awards Under New York and Inter-American Conventions

Neither the New York Convention nor the Inter-American Convention contains any exception permitting non-enforcement of an award simply because the arbitrators got their decision on the substance of the parties' dispute wrong, or even badly wrong. This is reasonably clear from the language of the Convention, which makes no reference to the possibility of a review of the merits in Article V's exhaustive list of the exclusive grounds for denying recognition of foreign and non-domestic awards. There is also no hint in the New York Convention's drafting history of

any authority to reconsider the merits of an arbitral award in recognition proceedings.

Likewise, the prohibition against review of the merits of the arbitrator's decision is one of the most fundamental pillars of national court authority interpreting the Convention. This prohibition has repeatedly and uniformly been affirmed by national courts, in both common law and civil law jurisdictions. Simply put: "the court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact" [Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287-88 (5th Cir. 2004)]. Thus, in the words of the Luxembourg Supreme Court [Judgment of 24 November 1993, XXI Y.B. Comm. Arb. 617, 623 (Luxembourg Cour Superieure de Justice) (1996)]:

The New York Convention does not provide for any control on the manner in which the arbitrators decide on the merits, with as the only reservation, the respect of international public policy. Even if blatant, a mistake of fact or law, if made by the arbitral tribunal, is not a ground for refusal of enforcement of the tribunal's award.

Or, as a Brazilian recognition decision under the Convention held [Judgment of 19 August 2009, Atecs Mannesmann GmbH v. Rodrimar S/A Transportes Equipamentos Industriais e Armazes Gerais, XXXV Y.B. Comm. Arb. 330, 331 (Brazilian Tribunal de Justica) (2010)]:

These questions pertain to the merits of the arbitral award that, according to precedents from the Federal Supreme Court and of this Superior Court of Justice, cannot be reviewed by this Court since recognition and enforcement of a foreign award is limited to an analysis of the formal requirements of the award.

Commentators have uniformly adopted the same view of the Convention [See, for e.g., K.-H. Bockstiegel, S. Kroll & P. Nacimiento, Arbitration in Germany 452 (2007)]. (at pp. 3707-3710)

Likewise, the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (2016 Ed.) ["UNCITRAL Guide on the New York Convention"] also states:

9. The grounds for refusal Under Article V do not include an erroneous decision in law or in fact by the arbitral tribunal. A court seized with an application for recognition and enforcement under the Convention may not review the merits of the arbitral tribunal's decision. This principle is unanimously confirmed in the case law and commentary on the New York Convention.”

(emphasis supplied)

68. It is apparent from above-mentioned decisions as to 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, and the NAFED was unable to supply, as it did not have any permission in the season 1980-81 to effect the supply, it required the permission of the Government. The matter is such which pertains to the fundamental policy of India and parties were aware of it, and contracted that in such an exigency as provided in clause 14, the Agreement shall be cancelled for the supply which could not be made. It became void under section 32 of the Contract Act on happening of contingency. Thus, it was not open because of the clear terms of the Arbitration Agreement to saddle the liability upon the NAFED to pay damages as the contract became void. There was no permission to export commodity of the previous year in the next season, and then the Government declined permission to NAFED to supply. Thus, it would be against the fundamental public policy of India to enforce such an award, any supply made then would contravene the public policy of India relating to export for which permission of the Government of India was necessary.

69. In our considered opinion, the award could not be said to be enforceable, given the provisions contained in Section 7(1)(b)(ii) of the Foreign Awards Act. As per the test laid down in *Renusagar* (supra), its enforcement would be against the fundamental policy of Indian Law and the basic concept of justice. Thus, we hold that award is unenforceable, and the High Court erred in law in holding otherwise in a perfunctory manner.

70. Though in view of the finding above, it is not necessary to go into other questions. It was argued that the Arbitrator was appointed in violation of the order passed by the High Court. The High Court on 20.3.1981 granted interim stay till 22.4.1981. A telex dated 20.3.1981 was sent informing that the High Court granted an interim stay. The FOSFA vide letter dated 6.4.1981 asked the NAFED to appoint its arbitrator by 20.4.1981. On 9.4.1981, NAFED informed FOSFA about the stay of the arbitration proceedings granted by the High Court. The interim order was extended on 22.4.1981 till further orders. On 23.4.1981, Mr. F.A.D. Ralfe, a nominee of the NAFED, was appointed as Arbitrator by FOSFA in the Arbitration Tribunal in violation of the order passed by the High Court.

71. It was also urged that after that, this Court stayed proceedings on 30.4.1982, it was responded by Alimenta S.A. on 4.5.1982 to NAFED that this Court did not have authority to stay the arbitration

proceedings. It was also argued that on 1.5.1981, NAFED objected to the appointment of Mr. F.A.D. Ralphe for their representation in the arbitration. On 30.10.1981, NAFED filed a writ petition against the Alimenta S.A. and Arbitrator to prevent the arbitration proceedings. It was further argued that the appellant was deprived of appointing arbitrators; the same was against the public policy. As per Rule 1(a) of FOSFA Rules, each party had the right to nominate its Arbitrators. As per Rule 1(d), the party claiming arbitration can only apply to FOSFA for the appointment of an arbitrator on behalf of the other party. As there was restraint order, the appointment of Arbitrator by FOSFA under Rule 1(d) of the Rules was illegal. A party claiming arbitration could only apply for the appointment of Arbitrator on behalf of another party. Learned senior counsel further urged that the action taken was in contravention of natural justice and is a nullity violating the interim order of the court as opined in *Manohar Lal (Dead) by Lrs. v. Ugrasen (Dead) by Lrs. & Ors.,* (2010) 11 SCC 557. In *Manohar Lal* (supra), the court held thus:

> "**24.** In *Mulraj* v. *Murti Raghunathji Maharaj,* AIR 1967 SC 1386, this Court considered the effect of action taken subsequent to passing of an interim order in its disobedience and held that any action taken in disobedience of the order passed by the Court would be illegal. *Subsequent action would be a nullity*.
>
> **25.** In *Surjit Singh* v. *Harbans Singh,* (1995) 6 SCC 50, this Court while dealing with the similar issue held as under: (SCC p. 52, para 4)
>
> > "*4.* … In defiance of the restraint order, the alienation/assignment was made. If we were to let it go as such,

> it would defeat the ends of justice and the prevalent public policy. When the court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the court orders otherwise. The court, in these circumstances has the duty, as also the right, to treat the alienation/assignment as having not taken place at all for its purposes."

26. In *All Bengal Excise Licensees' Assn.* v. *Raghabendra Singh*, (2007) 11 SCC 374, this Court held as under: (SCC p. 387, para 28)

> "*28.* … a party to the litigation cannot be allowed to take an unfair advantage by committing breach of an interim order and escape the consequences thereof. … the wrong perpetrated by the respondent contemnors in utter disregard of the order of the High Court should not be permitted to hold good."

27. In *DDA* v. *Skipper Construction Co. (P) Ltd.*, (1996) 4 SCC 622, this Court after making reference to many of the earlier judgments held: (SCC p. 636, para 18)

> "*18.* … '… on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them.'*"

28. In *Gurunath Manohar Pavaskar* v. *Nagesh Siddappa Navalgund*, (2007) 13 SCC 565, this Court while dealing with the similar issues held that even a court in exercise of its inherent jurisdiction under Section 151 of the Code of Civil Procedure, 1908, in the event of coming to the conclusion that a breach of an order of restraint had taken place, may bring back the parties to the same position as if the order of injunction has not been violated.

29. In view of the above, it is evident that any order passed by any authority in spite of the knowledge of the interim order of the court is of no consequence as it remains a nullity."

Thus, it was argued that the appointment of the arbitrator to constitute the Arbitral Tribunal violated the order of the Indian Court and it was against the public policy. Consequently, the respondent, Alimenta S.A., could not approach the Indian Court to enforce such an award passed by the Arbitral Tribunal.

72. Though this Court passed an interim order, ultimately, it dismissed the petition filed on behalf of the NAFED, and it was open to the appellant to raise the question at the relevant time when this court decided the matter in the year 1987. This court permitted the arbitration proceedings to continue. As such, we are of the opinion that though it would have been proper for the FOSFA to comply with the interim orders passed by this Court, the proceedings in which the temporary orders were given were dismissed way back in the year 1987. At that time, the question was required to be agitated. This Court permitted to continue proceedings in 1987. The said questions ought to have been raised at that stage; we cannot permit the appellant to raise them now. Hence, at this stage, we are not inclined to entertain and examine merits of the argument mentioned above.

73. Learned senior counsel appearing on behalf of the appellant also argued that NAFED was not allowed to have any legal representation before the arbitral tribunal or in the Board of Appeal. Rule 3 of the FOSFA Rules bars the parties from having legal representation before the Arbitral Tribunal. However, Rule 6 empowers the Board of Appeal to allow legal representation to the parties in case of particular circumstances. The NAFED through its solicitor M/s. Clyde and Company submitted letters on 16.1.1990 and 13.5.1990 to permit legal representation. However, the same was denied by the Board of Appeals. As such learned counsel argued that due opportunity of

defending to NAFED was not afforded. For this purpose, reliance was placed on *C.L. Subramaniam v. Collector of Customs, Cochin* (1972) 3 SCC 542 wherein the court observed:

> "6. Removal from service is a major penalty. Procedure for imposing major penalties is prescribed in Rule 15 of the Central Civil Services (Classification, Control and Appeal) Rules, 1957, a rule framed under Article 309 of the Constitution. Sub-rule (5) of that rule provides:
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> > "The Disciplinary Authority may nominate any person to present the case in support of the charges before the authority inquiring into the charges (hereinafter referred to as the Inquiring Authority. The government servant may present his case with the assistance of any government servant approved by the Disciplinary Authority, but may not engage a legal practitioner for the purpose unless the person nominated by the Disciplinary Authority as aforesaid is a legal practitioner or unless the Disciplinary Authority, having regard to the circumstances of the case, so permits."
>
> 23. It is needless to say that Rule 15 is a mandatory rule. That rule regulates the guarantee given to Government servants under Article 311. Government servants, by and large, have no legal training. At any rate, it is nobody's case that the appellant had legal training. Moreover, when a man is charged with the breach of a rule entailing serious consequences, he is not likely to be in a position to present his case as best as it should be. The accusation against the appellant threatened his very livelihood. Any adverse verdict against him was bound to be disastrous to him, as it has proved to be. In such a situation, he cannot be expected to act calmly and with deliberation. That is why Rule 15(5) has provided for representation of a Government servant charged with dereliction of duty or with contravention of the rule by another Government servant or in appropriate cases by a legal practitioner.
>
> 24. For the reasons mentioned above, we think that there had been a contravention of Rule 15(5). We are also of the opinion that the appellant had not been afforded a reasonable opportunity to defend himself. Hence the impugned order is liable to be struck down, and it is hereby struck down. The facts of this case are not such as to justify any fresh enquiry against the appellant. Hence we direct that no fresh enquiry shall be held against the appellant, and he be restored to the position to which he would have been entitled to but for the impugned order. The appeal is accordingly allowed. The appellant is entitled to his costs from the respondents both in this Court as well as in the High Court."

The decision of Board of *Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and Ors.* (1983) 1 SCC 124 has been relied on, wherein it was held:

> "9. We concern ourselves in this case with a narrow question whether where in such a disciplinary enquiry by a domestic tribunal, the employer appoints Presenting-cum-Prosecuting Officer to represent the employer by persons who are legally trained, the delinquent employee, if he seeks permission to appear and defend himself by a legal practitioner, a denial of such a request would vitiate the enquiry on the ground that the delinquent employee had not been afforded a reasonable opportunity to defend himself, thereby vitiating one of the essential principles of natural justice."
>
> (emphasis supplied)

74. It is not disputed that before the Arbitration Tribunal, the rule debars legal representation; hence the submission as to non-representation before the Tribunal, cannot be accepted. However, in appeal due to refusal to permit representation through a legal firm, the NAFED was not able to point out the prejudice caused to it. In the absence of proof of prejudice caused due to non-representation by a Legal Representative and to show that it was disabled to put forth its views, we cannot set aside the award on the ground that it would have been proper to allow the assistance of a Legal Representative. Thus, we are not inclined to render the award unenforceable on the aforesaid ground.

75. Learned senior counsel appearing on behalf of NAFED also argued that Mr. A.G Scott, the Arbitrator nominated by the respondent, delivered the award and, after that, appeared as a counsel

for Alimenta S.A. before the Board of Appeal. Thus, his participation in the appeal was bad in law. He could not have defended his award and subvert the basic norms of fairness. The action was against the concept of justice and rules of procedure, as observed in *The State of Punjab & Anr. v. Shamlal Murari & Anr.,* (1976) 1 SCC 719, wherein this Court found thus:

> "**8.** It is obvious that even taking a stern view, every minor detail in Rule 3 cannot carry a compulsory or imperative import. After all, what is required for the Judges to dispose of the appeal is the memorandum of appeal plus the judgment and the paper-book. Three copies would certainly be a great advantage, but what is the core of the matter is not the *number* but the presence, and the overemphasis laid by the court on *three* copies is, we think, mistaken. Perhaps, the rule requires three copies, and failure to comply therewith may be an irregularity. Had no copy been furnished of any one of the three items, the result might have been different. In the present case, copies of all the three documents prescribed, have been furnished but not three copies of each. This omission or default is only a breach that can be characterised as an irregularity to be corrected by condonation on application by the party fulfilling the condition within a time allowed by the court. We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, tho' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in extended time. Be that as it may, and ignoring for a moment the exploration of the true office of procedural conditions, we have no doubt that what is of the essence of Rule 3 is not that *three* copies should be furnished, but that copies of all the three important documents referred to in that suit shall be produced. We further feel that the court should, if it thinks it necessitous, exercise its discretion and grant further time for formal compliance with the rule if the copies fall short of the requisite number. In this view and to the extent indicated, we overrule the decision in *Bikram Dass's case*, AIR 1975 Punj & Har 1 (FB) ."

76. Learned counsel also relied on *Kailash v. Nankhu & Ors.*, (2005) 4 SCC 480, in which the court observed:

> "**28.** All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in *Sushil Kumar Sen* v. *State of* Bihar, (1975) 1 SCC 774 are pertinent: (SCC p. 777, paras 5-6)
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> > "The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.
> >
> > The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. … Justice is the goal of jurisprudence — processual, as much as substantive."
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> **29.** In *State of Punjab* v. *Shamlal* Murari, (1976) 1 SCC 719, the Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principle that: (SCC p. 720)
>
> > "Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."
>
> In *Ghanshyam Dass* v. *Dominion of* India, (1984) 3 SCC 46, the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle."

77. On behalf of the respondent, letter dated 17.11.2011 issued by FOSFA was relied on stating that even though the FOSFA rules are

silent on the issue of the first tier Arbitrator acting as a representative of the party in the second tier, *i.e.*, at the appellate stage, the practice prevalent at the relevant time in the UK allowed the same. The FOSFA mentioned in the letter that many parties in cases before FOSFA elected to make such an appointment with the agreement of the individual arbitrator concerned, and this practice was prevalent.

78. The Arbitrator appeared at the appellate stage, though, as per the Indian Law and the ethical standards, the Arbitrator could not have appeared at the second stage to defend arbitration award passed by him, and should have kept aloof. However, no concrete material has been placed on record to substantiate the objection as to prevailing practice and law in U.K. at the relevant time. Hence, we are not inclined to decide the issue in this case. Suffice it to observe that Arbitrator is supposed to follow ethical standards, and, in our considered view, ought not to have defended arbitration award passed by him in the subsequent judicial proceedings.

79. The question was also raised concerning the Board of Appeal, enhancing the rate of interest from 10.5 % to 11.25 %. We hold that it was not open to the Board of Appeal to increase the interest in the absence of appeal. As we have held award to be unenforceable under section 7 of the Foreign Awards Act, other submission does not survive for decision.

80. Resultantly, the award is *ex facie* illegal, and in contravention of fundamental law, no export without permission of the Government was permissible and without the consent of the Government quota could not have been forwarded to next season. The export without permission would have violated the law, thus, enforcement of such award would be violative of the public policy of India. On the happening of contingency agreed to by the parties in Clause 14 of the FOSFA Agreement the contract was rendered unenforceable under section 32 of the Contract Act. As such the NAFED could not have been held liable to pay damages under foreign award.

81. The appeal filed by the NAFED is thus allowed, and the impugned judgment and order passed by the High Court is set aside. Award is held to be unenforceable. No costs.

.....J.
(ARUN MISHRA)

.....J.
(M.R. SHAH)

New Delhi;
April 22, 2020.

.....J.
(B.R. GAVAI)