

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

**(Reportable)**

**O.M.P. 389 of 2006**

CINERGY CORPORATION PTE LTD. .... Petitioner

Through: Mr. D.K. Agarwal, Senior Advocate  
with Mr. Suryakant Singla, Mr. Shanto  
Mukerjee and Ms. Shagun Bhatnagar,  
Advocates.

Versus

NATIONAL AGRICULTURAL CO-OPERATIVE  
MARKETING FEDERATION OF INDIA LTD. .... Respondent

Through: Mr. T.K. Ganju, Senior Advocate with  
Mr. R.K. Mishra, Mr. Aquib Ali and Mr.  
Aditya Ganju, Advocates.

**AND**

**O.M.P. 243 of 2008**

NATIONAL AGRICULTURAL CO-OPERATIVE  
MARKETING FEDERATION OF INDIA LTD. .... Petitioner

Through: Mr. T.K. Ganju, Senior Advocate with  
Mr. R.K. Mishra, Mr. Aquib Ali and Mr.  
Aditya Ganju, Advocates.

Versus

CINERGY CORPORATION PTE LTD. .... Respondent

Through: Mr. D.K. Agarwal, Senior Advocate  
with Mr. Suryakant Singla, Mr. Shanto  
Mukerjee and Ms. Shagun Bhatnagar,  
Advocates.

**CORAM: JUSTICE S. MURALIDHAR**

**ORDER**  
**19.09.2012**

**O.M.P. No.389 of 2006**

1. This is a petition under Sections 47 and 48 of the Arbitration and Conciliation Act, 1996 ('Act') filed by the Petitioner Cinergy Corporation PTE Ltd. ('Cinergy') seeking enforcement of Foreign First Tier Arbitration Award No.3906 dated 11<sup>th</sup> April 2005 (hereinafter referred as 'First Tier Award') and Arbitration Appeal Award No.927 dated 16<sup>th</sup> November 2005 (hereinafter referred as 'Appellate Award') followed by the Final Foreign Arbitration Award dated 8<sup>th</sup> May 2006. Cinergy prays *inter alia* for the realization of the awarded amount from the Respondent National Agricultural Co-operative Marketing Federation of India Limited ('NAFED') by attachment and sale of NAFED's properties, both movable and immovable.

2. Upon notice being issued of the petition on 23<sup>rd</sup> August 2006, NAFED filed objections on 24<sup>th</sup> January 2007. The present order disposes of NAFED's objections to the enforcements of the aforementioned Awards.

3. The background to this petition is that on 16<sup>th</sup> September 2004 an email titled 'Trade Confirmation' was sent by Global Commodities (M) SDN BHD (hereinafter referred to as 'Global') to Cinergy confirming that the trade mentioned therein had been concluded through its 'broker'. The said email reads as under:

"We r plsd to cnfm fllwg trade concluded thru us as broker:

Trade confirmation No.: G 1297-04

Date: 16/09/2004

Seller: Cinergy Corporation Pte Ltd  
19, Hong Kong Street

Singapore 059662

Buyer: M/S National Agricultural Co-operative Marketing  
Federation of India Ltd.  
Sidhartha Enclave, Ashram Chowk  
Ring-Road New Delhi-110017

Product: Crude Palm Oil in Bulk

Qnty: 6000 metric ton

Price: USD 440.00 PMT CIF Kandla

Shpmt: During October 2004

Specs: FFA : 5% MAX / MNI : 0.5% MAX

Payment: By L/C from 1<sup>st</sup> class Indian Bank

Basis: Landed Weight Shipped Quality Final

Rules to govern: As per PORAM/FOSFA 81

Commission: USD 2.00 PMT payable by seller

TQ for yr support.

Rgds

Global Comm.”

4. This was followed by a message sent by Earthtech Enterprises Ltd.  
(‘Earthtech’) to Global on 18<sup>th</sup> September 2004 as under:

“Subject: Trade Confirmation

We are pleased to confirm the following:

Your Trade confirmation No.: G 1297-04

Seller: Cinery Corporation Pte Ltd  
19, Hong Kong Street  
Singapore-059662

Through Broker: Global Commodities (M) SDN BHD  
Unit D-7-5, Megan Avenue 1, No.189  
Jalan Tun Razak, 50400 Kuala Lumpur

Buyer: National Agricultural Co-operative Marketing  
Federation of India Ltd.  
Nafed House, 1 Sidhartha Enclave,  
Ashram Chowk, Ring Road, New Delhi-110014  
A/c. Earthtech Enterprises Limited  
39, 2<sup>nd</sup> Floor, Sidhartha Enclave, New Delhi-110017

Product: Crude Palm Oil in Bulk

Origin: Malaysian / Indonesian

Quantity: 6000 metric ton

Price: USD 440.00 P/MT CIF Landed Weight PMT Kandla  
Basis

Shipment: During October, 2004  
Specifications: FFA 5% MAX/MIN 0.5% MAX

Payment: By L/C from 1<sup>st</sup> Class Indian Bank

Basis: Shipped quality at load port & Landed Weight at  
Discharge Port Final to be certified by Geo-Chem For  
East Pvt. Ltd. or its nominee.

Rules to govern: As per PORAM/FOSFA 81

Others: Letter of Indemnity from the Buyer at Discharge port  
in case delay of documents”

5. On the basis of the above two documents, it is contended by Cinergy that a concluded contract resulted between Cinergy and NAFED whereby NAFED agreed to buy from Cinergy the said quantity of 6000 metric tonnes ('MTs') of crude palm oil in bulk. Cinergy's case is that following the above two documents, Cinergy sent a message to Global requiring

NAFED to establish a Letter of Credit ('L/C') in terms of the contract. According to Cinergy, Global advised it on 11<sup>th</sup> October 2004 that NAFED needed time up to 15<sup>th</sup> October 2004 to consider taking up the shipment or to wash out the contract. Cinergy states that on 15<sup>th</sup> October 2004 it placed NAFED in default for non-performance. On 18<sup>th</sup> November 2004 in terms of the contract Cinergy appointed Mr. R.A. Barber as its Arbitrator.

6. Cinergy applied to the Federation of Oils, Seeds and Fats Associations Limited ('FOSFA') on 23<sup>rd</sup> December 2004 seeking reference of the disputes to arbitration in terms of FOSFA Rules. After giving an opportunity to NAFED to appoint an Arbitrator on its own under the Rules, FOSFA appointed Mr. D. Barnett as NAFED's Arbitrator.

7. The substantive issue before the First Tier Arbitral Tribunal ('Tribunal') was the claim of Cinergy that NAFED had failed to open a L/C. A preliminary issue concerned the identity of the 'buyer'. On 11<sup>th</sup> January 2005 the Tribunal held that it had been correctly constituted to hear the dispute "including the point in contention as to whether it was NAFED or Earthtech Enterprises Ltd who were the Respondent in the issue". In the First Tier Award dated 11<sup>th</sup> April 2005, the Tribunal held on the basis of the correspondence of 16<sup>th</sup> September 2004 that the "sellers and the broker were firmly of the view that they were dealing with NAFED. There was nothing before us to say otherwise".

8. The First Tier Award then proceeded to consider what the word 'a/c' occurring below NAFED's name in the document dated 18<sup>th</sup> September 2004 meant. In para 7.13 of the First Tier Award the submission of NAFED that the said expression meant that NAFED was acting "as an agent for

Earthtech Enterprises Ltd.” was noticed and rejected. In paras 7.14 and 7.15 of the First Tier Award it was concluded as under:

“7.14 We have formed the view that the use of the word “a/c” merely goes to show that whilst NAFED is the principal to the Contract with Sellers there is an arrangement between NAFED and Earthtech Enterprises Ltd. that the performance of the Contract is for the benefit of Earthtech Enterprises Ltd. NAFED remains the principal in the transaction with Cinergy. It may well be that NAFED was to establish the Letter of Credit on behalf of Earthtech Enterprises Ltd, however this does not detract from the point that NAFED is the principal to the Contract. Sellers are not party to this arrangement between NAFED and Earthtech Enterprises Ltd.

7.15 Accordingly we find that National Agricultural Co-operative Marketing Federation of India Ltd is the principal to the Contract with the Sellers.”

9. Aggrieved by the First Tier Award dated 11<sup>th</sup> April 2005 which held that NAFED was the ‘buyer as far as the contract was concerned, NAFED filed an appeal before the Appellate Board of FOSFA (‘Appellate Board’). In its appeal NAFED *inter alia* contended that the ‘buyer’ for the purposes of the contract, if at all, was Earthtech and not NAFED. It was specifically pleaded that there was collusion between Cinergy and Global and distortion of facts by Cinergy. It alluded to the role of Mr. Kiran Shah who acted as a co-broker in the transaction and submitted that Global was only a sub-broker. An affidavit dated 20<sup>th</sup> July 2005 of Mr. Kiran Shah in support of the above submission was tendered by NAFED before the Appellate Board. NAFED specifically urged that Mr. Kiran Shah had neither acknowledged the 16<sup>th</sup> September 2004 Trade Confirmation, nor was it signed by NAFED.

10. All the above submissions of NAFED were negated by the Appellate

Board in its Appellate Award. It concluded in para 8.7 that the document dated 16<sup>th</sup> September 2004 was received by NAFED “on the same day as Cinergy”. It was further observed that if indeed they were not a party to the transaction, they should have immediately sent a “strongly worded protest”. It then proceeded to answer the submissions of NAFED in para 8.10 as under:

“Our answer to this argument is as follows: Given that neither NAFED nor Cinergy at this time disagreed that the broker in the transaction was Global; given that Global issued a perfectly professional and usual broker’s confirmation detailing the terms agreed through his intermediary between NAFED and Cinergy; given that neither Cinergy nor, more importantly, NAFED questioned the terms of that Confirmation as received by both parties at the time or, indeed, until the commencement of Cinergy’s arbitration against NAFED; given that the later purported confirmation comes from a third party; given that this purported “confirmation” was not sent by Earthtech to either NAFED or Cinergy but only to Global; given that the third party’s “confirmation” actually confirms the terms of Global’s Confirmation and, more particularly, describes NAFED as the Buyer under the Contract; given that the only difference between the Confirmation issued by the broker and the purported “confirmation” sent to the broker only by Earthtech was the adjunction of the works “A/c Earthtech Enterprises Limited, 39, 2<sup>nd</sup> floor, Sadna Enclave, New Delhi - 110017”, the argument that this communication effects such a fundamental change in the Contract as to substitute a wholly new party as Buyer is, *prima facie*, singularly unconvincing.”

11. The Appellate Board held that NAFED and Cinergy were bound by the terms of Global’s confirmation of 16<sup>th</sup> September 2004, that Earthtech was a third party and that Earthtech’s confirmation by email of 18<sup>th</sup> September 2004 “can have no effect on the respective rights and duties of NAFED and Cinergy under the terms of their agreement as confirmed by Global on 16<sup>th</sup>

September”. What appears to have weighed with the Appellate Board was that since the confirmation dated 16<sup>th</sup> September 2004 specifically described NAFED as the ‘buyer’, the adjunction of the words “a/c Earthtech Enterprises, relates to arrangements made between Earthtech and NAFED entirely extraneous and unknown to Cinergy”. It then proceeded to discuss the evidence furnished by the parties. The argument that there was collusion between Cinergy and Global was rejected for lack of evidence. Ultimately the appeal was dismissed with costs.

12. Cinergy has placed documents on record to show that NAFED had, aggrieved by the Appellate Award, filed proceedings in the High Court of Justice, Queen’s Bench Division (‘QBD’), Commercial Court and that its application was dismissed on 23<sup>rd</sup> June 2006. The order that has been placed on record stated to have been passed by the Judge of the QBD, Commercial Court reads as under:

“It is ordered and directed that:

1. The application of NAFED dated 20<sup>th</sup> June 2006 is dismissed.
2. The application of Cinergy dated 3<sup>rd</sup> March 2006 succeeds and NAFED’s Arbitration Claim 2006 Folio 61 dated 24<sup>th</sup> January 2006 is dismissed.
3. NAFED is refused permission to appeal.
4. NAFED is to pay Cinergy’s costs of Cinergy’s 3<sup>rd</sup> March 2006 application and NAFED’s 20<sup>th</sup> June 2006 application. These costs are summarily assessed in the amount of £24,500 and are to be paid by NAFED to Cinergy within 14 days (i.e. by 4.30 pm on 7<sup>th</sup> July 2006).

Dated 23<sup>rd</sup> June 2006

Signed”

13. In its objections filed to the present petition by Cinergy under Sections 47 and 48 of the Act, the first ground urged by NAFED is that there is “no arbitration agreement between the Respondent and the Petitioner as the Respondent is not a party to the purported agreement dated 16<sup>th</sup> September 2004”. The case of NAFED is that it entered into a Memorandum of Understanding (‘MoU’) with Earthtech on 16<sup>th</sup> October 2003 in terms of which NAFED agreed to open sight/usance L/C for the import of various commodities like kerosene oil, furnace oil and base oil from foreign supplier(s) on behalf of Earthtech by placing purchase order(s) and opening foreign L/Cs from time to time and to sell the entire quantity or part thereof so imported to Earthtech either on High Seas Sale basis or in lots. In terms of the said MoU, NAFED was indemnified by Earthtech for all prices and costs in support of purchase order involving Earthtech. An addendum to the MoU was entered into between Earthtech and NAFED on 12<sup>th</sup> February 2004 whereby Clause 1.1 of the MoU was replaced to include certain other products.

14. NAFED states that Earthtech entered into a negotiation for purchase of 6000 MT crude palm oil in bulk from Cinergy through their broker Global, without in any manner involving NAFED. In particular NAFED states that it had no notice of the so called trade confirmation of 16<sup>th</sup> September 2004 or Earthtech’s reply to Global on 18<sup>th</sup> September 2004. According to NAFED, it was only on 19<sup>th</sup> October 2004 that it received for the first time a notice of default dated 16<sup>th</sup> October 2004 from Cinergy. It was only then that NAFED became aware of the present transaction including the trade confirmation dated 16<sup>th</sup> September 2004. Upon NAFED getting in touch

with Earthtech, a letter dated 9<sup>th</sup> November 2004 was addressed to Cinergy by Mr. Parvinder Khatra, Advocate on behalf of Earthtech. In the said letter it was stated that on coming to know of the identity of the Director of Cinergy, Earthtech had “immediately and forthwith cancelled the said trade confirmation dated 18<sup>th</sup> September 2004 as they were not comfortable in having trade relations with him because of his past antecedents”. It was stated that Earthtech sent its cancellation on 20<sup>th</sup> September 2004 itself. Thereafter, in paras 5, 6 and 7 of the said letter it was stated as under:

“5. That from the correspondence received from your broker, it appears that you had put NAFED, India on final notice as per your letter dated 07.10.2004 whereas it is clear from the facts stated above that NAFED, India was not concerned and / or connected with the above matter. There was no question of taking your notice seriously and/or the contract seriously and/or establishing an operative L/C as no contract has been entered into neither between NAFED, India and yourself and nor between yourself and my clients.

5. That in the exchanged correspondence it has been nowhere stated by NAFED, India and/or my clients that they need some time upto 15<sup>th</sup> October 2004 to consider taking up shipment or to washout the contract. It is pertinent to note that there is/was no contract in existence at any point of time regarding trade Reference No. G 1297-04.

7. That my clients specifically state that as no contract has been concluded between yourselves and my clients hence there is no question of existence of an arbitration clause which may result in the initiation of any arbitration proceedings.”

15. Another letter was addressed by Mr. Parvinder Khatra to Cinergy on 29<sup>th</sup> November 2004, this time on behalf of NAFED itself in which it was stated as under:

“Dear Sirs,

My aforesaid clients have placed before me the correspondence exchanged between you and them and in particular your claim submissions and documents sent under date of 18<sup>th</sup> November 2004 with copies to FOSFA International, United Kingdom, Mr. Rob A Barber, United Kingdom and M/s. Global Commodities (M) Sdn. Bhd., Malaysia with instructions to address you as follows:

That from the supporting documents marked as “Annex 1” to “Annex 32” my clients have not been able to trace the alleged contract concluded between them and yourselves and which is alleged to have been lapsed or go into default regarding 6000 MT Crude Palm Oil in bulk CIF Kandla.

In the premises, I request you on behalf of my clients to make available to me the alleged original contract with “NAFED” to enable us to proceed further.”

16. The above facts were also placed before the High Court of Justice, QBD, Commercial Court in the form of an affidavit of Mr. Rajvansh on behalf of NAFED. Cinergy on its part refuted all the above contentions of NAFED in its letter dated 2<sup>nd</sup> December 2004 and that “NAFED is and was our contractual buyer on a contract concluded via brokers Global”. NAFED states that it then requested Earthtech to take immediate action and that is how Earthtech appointed Mr. Satinder Kapur as their Advocate to represent before the arbitral Tribunal that the buyer was not NAFED.

17. In addition to reiterating the above contentions, Mr. T.K. Ganju, learned Senior counsel appearing for NAFED, referred to Section 47(1)(b) read with Section 48(1)(a), Section 48(2)(a) and Section 7 of the Act. He submitted that in terms of the definition of “arbitration agreement” under Section 7 of the Act, even if there was no arbitration agreement in writing as such signed by the parties, such agreement had to be contained in a document signed by the parties or in an exchange of letters, telegraph, telex

or other means of communication between them. He pointed out that in the instant case at no time did Cinergy get in touch with the officers of NAFED. There was no correspondence between NAFED and Cinergy which would prove the existence of an arbitration agreement between the parties.

18. Mr. Ganju referred to the judgment of the Supreme Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. (2005) 7 SCC 234* and submitted that even at the post-Award stage it was possible for the Court to undertake an enquiry under Section 48(1)(a) of the Act into the question whether there exists a valid arbitration agreement between the parties “when the enforceability of the ensuing Award is questioned”. Mr. Ganju submitted that the existence of a valid arbitration agreement was a *sine qua non* and had to be shown by the party seeking enforcement of a foreign Award under Section 49 of the Act. He referred to the decision of the Supreme Court in *Trimex International FZE Ltd., Dubai v. Vedanta Aluminium Ltd., India JT (2010) 1 SC 474* and the decision of this Court in *AgriTrade International Pte. Ltd. v. National Agricultural Co-operative Marketing Federation of India Ltd. (2012) II AD (Delhi) 616*.

19. The above submissions of Mr. Ganju were countered by Mr. D.K. Agarwal, learned Senior counsel appearing for Cinergy. Placing considerable reliance on the provisions of Section 5 of the English Arbitration Act, 1996 (‘EAA’), Mr. Agarwal submitted that an arbitration agreement did not necessarily have to be signed by the parties. He submitted that there could be an agreement in writing even “by exchange of communications in writing”. In terms of Section 5(3) of the EAA where “the parties agree otherwise than in writing by reference to terms which are

in writing, they make an agreement in writing”. He also placed reliance on the decision of the Supreme Court in *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited (1993) 3 SCC 137* and on the decision of the Calcutta High Court in *Ram Chandra Ram Nag Ram Rice & Oil Mills Ltd. v. Howrah Oil Mills Ltd. AIR 1958 Calcutta 620* to emphasize that an agreement need not necessarily be signed by both the parties and that “the acceptance may be in writing or by conduct or by oral agreement”. Referring to the MoU dated 16<sup>th</sup> October 2003 followed by the addendum dated 12<sup>th</sup> February 2004, Mr. Agarwal submitted that throughout NAFED and Earthtech had been acting in concert and it was in this background that the acceptance by Earthtech of the trade confirmation dated 16<sup>th</sup> September 2004 by its own message dated 18<sup>th</sup> September 2004 had to be understood. He pointed out that at no point of time did NAFED, after becoming aware of the placing of the above purchase order, resile from it. It could have written to Cinergy either withdrawing the order or denying that such an order had been placed by it. He submitted that since NAFED was silent despite being aware of the trade confirmation dated 16<sup>th</sup> September 2004 and of Earthtech’s subsequent communication dated 18<sup>th</sup> September 2004, NAFED could not wriggle out of its contractual obligation under the purchase order.

20. Mr. Agarwal referred to the submissions by NAFED before both the Tribunal as well as the Appellate Board that it was only acting as an agent for Earthtech. According to Mr. Agarwal, this showed that NAFED was not denying either the contract or the relationship it had with Earthtech. If indeed Earthtech had confirmed the purchase order by the letter dated 18<sup>th</sup> September 2004 then it was plain that the transaction was with NAFED as the buyer. He also referred to the letters written by Mr. Satinder Kapur on

behalf of Earthtech admitting to the existence of the contract and in particular to a letter dated 7<sup>th</sup> January 2005 addressed to FOSFA.

21. The central question that arises for decision is whether in the facts and circumstances there could be said to be a valid arbitration agreement between the parties? In *Shakti Bhog Foods Limited v. Kola Shipping Limited (2009) 2 SCC 134* while interpreting Section 7 of the Act, the Supreme Court explained that the existence of an arbitration agreement could be inferred by a document signed by the parties exchanged by letter, telegraph, telex or other communications which provide record of the agreement. In the subsequent decision in *Trimex International FZE Ltd.*, the Supreme Court observed in para 60 that “it is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of telecommunication”. At the stage of enforcement Section 47(1)(b) of the Act mandates the production by the person seeking enforcement of the arbitration agreement in writing.

22. In the present case, NAFED has consistently maintained that it was not the buyer although it is named as such in the said trade confirmation dated 16<sup>th</sup> September 2004. The issue was dealt with both by the Tribunal and the Appellate Board. Since Cinergy was asserting that NAFED was the buyer and this was disputed by NAFED, the question that was required to be addressed by the Tribunal as well as the Appellate Board was whether in fact there was a written agreement between NAFED and Cinergy to refer their disputes to arbitration.

23. The wording of Section 5 of the EAA is no different in its essential features from Section 7 of the Act, which reads as under:

“7. Arbitration agreement—(1) In this part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) an arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. ”

24. Even assuming that the Tribunal and the Appellate Board were to go by the EAA provisions then the question whether an arbitration agreement could be inferred from any written exchange between the parties still had to be addressed. Since the two parties before the Tribunal and the Appellate Board were Cinergy and NAFED, the question that had to be addressed was whether there was any valid arbitration agreement between them.

25. It is obvious that the trade confirmation dated 16<sup>th</sup> September 2004 is a document sent by Cinergy's broker i.e. Global to Cinergy. It is significant that it is not a document addressed to NAFED at all. In fact there is nothing to show that the copy of the said document was received by NAFED on the same day as it was received by Cinergy. The finding to that effect in para 8.7 of the Appellate Award is based on no evidence. It is not understood that on what basis the Appellate Board came to the above factual conclusion. Indeed, there was absolutely no document placed on record which shows the exchange of correspondence between Cinergy and NAFED. In the circumstances, the burden was on Cinergy to show even in terms of Section 5 of the EAA as to how the existence of an arbitration agreement could be inferred. It must be observed here that the requirement of law even under the Arbitration Act, 1940 which instantly does not apply to the extant case, as explained by the Calcutta High Court in *Ram Chandra Ram Nag Ram Rice & Oil Mills Ltd.* was that the existence of an arbitration agreement which is not signed could be inferred where the acceptance is in writing or by conduct. There has to be some proof that the other party to the alleged arbitration agreement has, even if it has not signed such arbitration agreement, accepted the existence of such arbitration agreement in writing or by conduct.

26. There is not a single letter written by NAFED or any agent of NAFED accepting the existence of an arbitration agreement between it and Cinergy. On the contrary there is sufficient material on record to show that Cinergy was told in no uncertain terms that no contract had been entered into by or on behalf of NAFED. On its part Earthtech addressed a letter on 7<sup>th</sup> January 2005 to NAFED clarifying as under:

“Dear Sir,

Subject:- FOSFA Arbitration initiated by Cinergy Corporation Pte. Ltd.

With reference to the above, kindly note that there is no contract or agreement in any form between NAFED and Cinergy Corporation Pte. Ltd.

For your information, a Trade agreement was signed by Earthtech Enterprises Limited with Cinergy Corporation Pte. Ltd. This did not materialize and is being contested by us directly and appropriately. A copy of the latest communication dated 4<sup>th</sup> January 2005 from our legal counsel M/s. Satinder Kapur & Associates to FOSFA International, United Kingdom is enclosed for your reference and advice.

We trust this clarifies the matter.”

27. NAFED addressed a letter to the members of the Tribunal on 1<sup>st</sup> March 2005 as under:

“Without prejudice to our stand that NAFED is not a party to contract dated 18<sup>th</sup> September 2004 executed between M/s Earthtech Enterprises Ltd. and M/s Global Commodities nor is connected in any way and with the arbitration proceedings, we hereby authorize M/s Satinder Kapur & Associates, C-39, Anand Niketan, New Delhi-21, acting through its senior partner, Mr. Surinder Kapur, to appear before the arbitral tribunal and represent us in the aforesaid arbitration proceedings, make statements & file documents on our behalf in connection with the subject arbitration, so as to safeguard the interest and get our name deleted from the array of parties.”

28. The letter dated 29<sup>th</sup> November 2004 addressed by Mr. Khatra to Cinergy, which has been extracted hereinabove, also reiterated the above position. Mr. Satinder Kapur by his letter dated 4<sup>th</sup> January 2005 categorically stated that “there is no contract, let alone any binding or concluded contract, between Cinergy, the “Claimant”, and NAFED, the

‘Respondent’. If at all, a contract, at best conditional, may be alleged to exist between Cinergy and Earthtech (Global having acted as an agent of Cinergy and NAFED, at best, an agent of Earthtech)’.

29. Neither the First Tier Award nor the Appellate Award discusses the above correspondence exchanged between the parties. If indeed the documents were before it, there is no explanation why the Tribunal and the Appellate Board did not advert to them. If it was not placed at all before them it is more unfortunate because Cinergy could be guilty of having suppressed material facts and documents that had a direct bearing on the issue.

30. There is considerable merit in the contention of Mr. Ganju that the NAFED being a Public Sector Multi-State Corporative within the meaning of Multi-State Co-operative Societies Act, 2002, NAFED can hardly be expected to enter into a transaction which was not in writing. He referred to the bye-laws of NAFED to demonstrate the improbability of NAFED entering into a contract worth over Rs.1 crore without there being any written correspondence, communication, instructions or approvals of the NAFED Executive Committee to such transaction. This is a case where there was in fact no proof of NAFED being a party to any arbitration agreement with Cinergy which was *sine qua non* for arbitration proceedings to have even commenced. Without addressing this fundamental question both the Tribunal as well as the Appellate Board devoted their all energies to understand the clauses of the arbitration agreement with Earthtech as a result of the document dated 16<sup>th</sup> September 2004.

31. The Appellate Board also proceeded on the erroneous premise that

NAFED had been furnished with the copy of the said document on the same day when it was generated and that NAFED had not protested against the said document. The evidence referred to hereinbefore demonstrates the correct position. Although Mr. Ganju pleaded that entire transaction demonstrated the *mala fide* intentions of Cinergy, the Court does not consider it necessary to examine such question in the absence of any evidence in support of such plea.

32. In conclusion, the Court is satisfied that there was no valid arbitration agreement between the parties within the meaning of Section 7 read with Section 47(1)(b) of the Act. Consequently, the First Tier Award, the Appellate Award and the Final Foreign Arbitration Award cannot be enforced in terms of Section 47(1) read with Sections 48(1)(a) and 48(2)(a) of the Act.

33. The objections raised by NAFED are sustained and O.M.P. No.389 of 2006 filed by Cinergy is dismissed with costs of Rs.30,000 which will be paid by Cinergy to NAFED within four weeks from today.

**O.M.P. No.243 of 2008**

34. In view of the order passed by this Court hereinbefore in O.M.P. No.389 of 2006, Mr. T.K. Ganju, learned Senior counsel appearing for NAFED states that he is not pressing for the relief prayed for in this petition.

35. The petition is disposed of as not pressed.

**S. MURALIDHAR, J.**

**SEPTEMBER 19, 2012** /bs