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The Centrotrade Saga: A Case Commentary

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CENTROTRADE MINERALS & METALS INC. Vs. HINDUSTAN COPPER LIMITED

(LNIND 2020 SC 293)

CASE DETAILS:

Citation: LNIND 2020 SC 293

Hon'ble Judges: Rohinton Nariman J., S. Ravindra Bhat J., V. Ramasubramanian J.

Decided on: 2nd June 2020

INTRODUCTION:

The case of Centrotrade Minerals & Metals Inc. Vs. Hindustan Copper Limited (hereinafter, referred to as Centrotrade case) is a landmark case in the field of arbitration. Firstly, this case has laid down the principal of two-tier arbitration in India; and, secondly, owing to its long history and the number of hearings and judgements passed since 2001. Through this case, the Hon'ble Supreme court not only laid down its stance regarding two-tier arbitration but also reposed faith regarding its pro-arbitration stance. This case is related to Section 44 of the Arbitration and Conciliation Act, 1996 under which the definition of a foreign award is given.

The two-tier process gives the party dissatisfied with the first award an opportunity to appeal against the award by way of an appeal and the appeal is heard freshly upon merits of the case. It is pertinent to note that the second award passed is binding on the parties, subject to the recourse that the parties may have under the provisions of Arbitration Act.

FACTS:

Centrotrade Minerals & Metals Inc. is an American company whose business portfolio is of selling and purchasing non-precious metals which include Copper concentrate. Hindustan Copper Ltd. (hereinafter, HCL) is a Government of India undertaking whose one of the businesses is that of purchasing Copper concentrate. Both the companies entered into an agreement 16th January 1996 where Centrotrade was the seller and HCL was the purchaser of Copper Concentrate.

Once the delivery was done, all payments were made per the contract. An issue arose between the parties regarding the quantity of dry weight of copper concentrate delivered.

However, there was an arbitration clause in the agreement. According to clause (14) of the agreement, the seat of first arbitration was in India with accordance to rules and regulations of Arbitration and Conciliation Act, 1996. If either of the party was dissatisfied with the first award, then according to the clause, they can proceed for an appeal to London where the arbitration

would be carried in accordance to the rules and regulations of International Chamber of Commerce and the result will be binding upon both the parties.

Regarding the issue, Centrotrade invoked the arbitration clause given under clause (14) of the agreement. The Indian arbitrator awarded a NIL award. Later on, Centrotrade invoked the second part of clause (14) of the agreement according to which an appeal was filed whose seat of arbitration was in London. The arbitrator appointed by the International Chamber of Commerce was Jeremy Cook. Even before Jeremy Cook could have delivered the award, HCL (Hindustan Copper Limited) filed a suit in a court at Khetri. Dissatisfied by the orders, HCL filed a revision petition against the order of Khetri court in the High Court of Rajasthan. The High Court of Rajasthan restrained HCL from any further engagement in the London arbitration. This injunction was ultimately vacated by the Hon'ble Supreme Court on 08.02.2001. Mr Jeremy Cook then passed an award in favour of Centrotrade in London.

ISSUES:

1. Whether the clause regarding two-tier arbitration is permissible in India or not?
2. Whether HCL was given ample opportunity to be heard and interpretation of Section 48 (1) (b).

JUDGEMENTS:

The first judgement in the Centrotrade and HCL saga was given in 2006 by S.B. Sinha J. and Tarun Chatterjee J. regarding the permissibility of two-tier arbitration. This judgement ended in a split decision[1].

The second judgement[2] upheld the legality of two-tier arbitration in India.

The third and the final judgement[3] of this saga was mainly focused on the issues of Hindustan Copper Limited not being able to present its case and the enforcement of ex-parte order in India. The court held that HCL had been given ample opportunity to be heard and that an ex-parte order is enforceable in India.

IS TWO-TIER ARBITRATION PERMISSIBLE OR NOT?

The main contention regarding this issue was that the Arbitration and Conciliation Act, 1996 did not provide for an appellate arbitration, hence, there was no scope for second arbitration in India.

[1] *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Limited,* ((2006) 11 SCC 245).
[2] *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Limited, ((2017) 2 SCC 228).*
[3] *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Limited (LNIND 2020 SC 293).*

The Hon'ble Supreme Court while answering this question placed its reliance upon the reports of UNCITRAL working model. According to this, a model law shall not exclude the two-tier arbitration system. The Hon'ble Court also held that since this system has been prevalent even before the inception of The Arbitration Act and that the act nowhere chooses to contain any objections against it, the same cannot be prohibited.

The second issue being contested regarding the act was party autonomy under Section 34. Section 34 provides for an application to set aside an arbitral award. It was contested that an arbitral award can only be set aside by courts having jurisdiction. The court stated that the availability of recourse from the court of law does not mean that the parties cannot agree on an alternative option for appealing against the arbitral award. The court also held that appellate arbitration clause is not violative of fundamental policy because there is nothing in the Arbitration Act that prohibits two-tier arbitration.

SECTION 48 (1) (B)

Section 48 deals with the refusal of enforcement of a foreign award. Section 48 (1) (b) deals with lack of proper notice, i.e., the party against whom the award is made has not been given proper notice concerning the appointment of an arbitrator, arbitral proceedings and was unable to present its case.

The court in its judgement held that the expression 'was otherwise unable to present his case' in Section 48 (1) (b) cannot be said to be given an expansive meaning and has to be interpreted in a narrow sense since it is a facet of natural justice and can be breached only when a party is not given a fair hearing opportunity by the arbitrator.

The latest judgement has highlighted a mistake made my Justice Chatterjee of Calcutta high court. The arbitrator had received more than sufficient material from HCL before the last deadline. The arbitrator without considering any of that had delivered the award. The Supreme Court had made it clear that the 2006 judgement was against its pro-arbitration sentiments. Also, the court had referred to Ssangyong case[4] in which it was held that the expression in question would be applicable at the hearing stage and not after the award is delivered. The court also held that a good working test to ascertain whether a party was allowed to be heard or not is to check whether the circumstances outside party's control have combined to deny the party a fair hearing or not. This test was formulated in Vijay Karia case[5].

[4] Ssangyong Engineering and Construction Co. Ltd. vs. National Highways Authority of India (NHAI), 2019 SCC OnLine SC 677

[5] Vijay Karia vs Prysmian Cavi E Sistemi Srl, (2020 SCC OnLine SC 177)

ANALYSIS:

This case is a stellar example of the Hon'ble Supreme Court of India showing it pro-arbitration approach. Justice Nariman has even relied upon foreign judgements to substantiate his judgement on enforcement of foreign awards in India. With this judgement, the court has laid down effective rules and regulations and has also sent a clear message that India as a country had adopted a pro-arbitration approach. The court has also held the obligation of India concerning New York Convention whose objective was smooth enforcement of foreign arbitral awards.

With the court's interpretation regarding Section 48, the section has been made watertight. Narrowly interpreting section 48 would support in the enforcement of an arbitral award whereas if its meaning is expanded then that would be in contravention to the objective of New York convention. The defence of natural justice could have been misused by a party deliberately avoiding to take part in the proceedings. Through this judgement, it has been made sure that this loophole is no more exploited.

Although there are still a few loose strings hanging around like the time frame between the first award and the appeal against. This is a strong issue since time plays a vital factor and a loophole that can be exploited in creative ways. The next loose end is that the procedure of appointing an appellate tribunal. Once these loose ends are tied up, enforcement of foreign awards and having an arbitral appeal against an award would be easy.