Enforcement of a foreign award cannot be refused under Section 48 (1) (b) ACA when the party chose not to present its case before the arbitral tribunal (Supreme Court of India)

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Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., ("Centrotrade III")

Court: Supreme Court of India | **Case Number**: Civil Appeal No. 2562 & 2564 of 2006 | **Citation**: 2020 SCC OnLine SC 479 | **Judges:** RF Nariman, S Ravindra Bhat and V Ramasubramanian JJ | **Date**: 02 June 2020 | **Available at**: https://indiankanoon.org/doc/90056159/

The court had before it a foreign award. Hindustan Copper Limited ("HCL") resisted its enforcement on the ground that it had been unable to present its case before the arbitrator. This was the third round of litigation. For a brief background of *Centrotrade I* and *Centrotrade II* see Section A below. For the court's analysis of the arguments concerning the facts of the case, see Section B below. For the court's discussion of the law, see Section C.

A. The background of the previous round of litigation: A 3-judge bench decided on the validity of a two-tier system arbitration clause. But, the issue of enforceability was left for another bench (because of 'roster' issues)

Centrotrade contracted to purchase copper concentrate from HCL. The contract had a two-tier arbitration clause. First, any dispute was to be settled by arbitration in India. Then, an affected party could appeal to a second arbitration in London under the rules of the International Chamber of Commerce ("ICC").

Disputes arose, and Centrotrade invoked arbitration. HCL, however, filed an anti-arbitration suit in the State of Rajasthan. A stay order came to be passed by the High Court, which the Supreme Court later vacated. The ICC Court also decided that the arbitrator could continue with the arbitral proceedings.

The arbitration in India resulted in a "nil award" in 1999. Centrotrade invoked the second tier, and the arbitrator appointed by ICC made a money award in Centrotrade's favour in 2001. Centrotrade applied to the Calcutta High Court for enforcement. A single judge ruled that the award was enforceable. HCL appealed to a 2-judge bench which set aside the order of the single judge. Then Centrotrade applied to the Supreme Court. A bench of SB Sinha J and Tarun Chatterjee J heard the matter. Because of a difference of opinion, they delivered two separate judgments, which are reported in *Centrotrade Minerals & Metals Inc.* v. *Hindustan Copper Ltd.*, (2006) 11 SCC 245 ("*Centrotrade I*"). SB Sinha J concluded that the two-tier clause was invalid, and the award could not be enforced. Tarun Chatterjee J ruled that the two-tier system was valid, but the award could not be enforced because HCL was not given a fair opportunity to present its case before the ICC arbitrator.

Given the difference of opinion on the validity of the two-tier clause, the matter went to a three-judge bench of Madan B Lokur, RK Agarwal and Dr DY Chandrachud JJ. The 3-judge court said that it proposed to hear the case only on the issue of the two-tier system and "depending upon the answer, the

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appeals would be set down for hearing on the remaining issue."[1] This bench concluded in *Centrotrade Minerals & Metal Inc.* v. *Hindustan Copper Ltd.*, reported in (2017) 2 SCC 228 ("*Centrotrade II*") that a two-tier arbitration procedure was permissible.

The court directed that the matter "should be listed again for consideration of the second question which relates to the enforcement of the appellate award."

B. The issue of enforceability (decided by another three-judge bench)

On the issue of enforceability of the award, HCL mainly argued that the enforcement should be refused under Section 48 (1) (b) ACA under which enforcement of an award can be refused if "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case." There were a few ancillary arguments.

The discussion in the judgment on Section 48 (1) (b) ACA is not linear. For the reader's convenience, HCL's arguments can be put into the following heads and sub-heads.

B1. HCL's preliminary submission

As a preliminary point, HCL argued that the question of being unable to present one's case was not referred to a larger bench by *Centrotrade I* because there was no difference of opinion on this; Chatterjee J had decided the point in HCL's favour, and SB Sinha J had made no observation on it. The only point of difference between them was the validity of the two-tier arbitration clause. Therefore, the issue could not be adjudicated again.

The court rejected this submission by noting that *Centrotrade I* had referred the "matter" for reconsideration. The expression "matter" was a reference to the entire matter, as made evident by *Centrotrade II,* which decided the issue of two-tier and directed that the appeal be listed for reconsideration on the subject of enforcement.

B2. The arbitrator did not allow more time for HCL to furnish documents and submissions. HCL could not effectively present its case before the arbitrator

In *Centrotrade I,* at paragraphs 164 to 169, Chatterjee J was of the view that HCL could not effectively present its case before the ICC arbitrator, and enforcement should be refused. He had examined the facts in detail. He had referred to two decisions–*Hari Om Maheshwari* v. *Vinitkumar Parikh,* (2005) 1 SCC 379 and *Minmetals Germany GmbH* v. *Ferco Steel Ltd.,* (1999) 1 All ER (Comm) 315. He noted their principle to be that "where a party is refused an adjournment and where it is not prevented from presenting its case, it cannot, normally, claim violation of natural justice and denial of a fair hearing."

However, on the facts, he said that in the light of the delays, some of which were not attributable to HCL (for example, the 9/11 attack on the US), it was only fair to excuse HCL's lapse in filing the relevant material on time.

Nariman J in *Centrotrade III* examined the correctness of Chatterjee J's findings made in *Centrotrade I*. Nariman J found that the arbitrator had set out a clear timetable on 03 May 2001. Still, HCL served no defence submissions or supporting evidence. The time was extended, giving HCL the respondent the last opportunity. Then on 09 August, the arbitrator sent a communication saying that he would proceed with the award. He received a letter on 11 August from HCL's lawyers requesting more time. It was

[1] "We have adopted this somewhat unusual course since the roster of business allowed us to hear the appeals only sporadically and therefore the proceedings before us dragged on for about three months."

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granted. Another extension was sought and given again until 12 September 2001. HCL made its submissions on 13 September 2001.

The award was made on 29 September 2001.

Nariman J found that the arbitrator considered HCL's submissions of 13 September 2001. In *Centrotrade* I, Chatterjee J had concluded that between 13 and 29 September 2001, the arbitrator received further material from HCL, which he did not consider while making the award. Nariman J found that this was purely speculation, made without any factual basis.

Nariman J then further addressed this issue on the legal principles and concluded there was no breach of natural justice:[2]

(a) He added that "given the authorities referred to by us hereinabove," the arbitrator cannot be faulted on this ground as he is in control of the arbitral proceedings and procedural orders which give time limits must be strictly adhered to. (See section C below for the authorities).

(b) He also added that the finding of Chatterjee J that "given the attack in New York on 11.09.2001, the learned arbitrator should have excused further delay and should not have acted on frivolous technicalities" flew in the "face of the judgments referred to by us hereinabove" on the approach of a court enforcing a foreign award. (*See* section C below for the judgments).

(c) He also added that though *Hari Om Maheshwari and Minmetals* were referred by Chatterjee J, he did not apply the ratio of those judgments. "Had he applied the ratio of even these two judgments, it would have been clear that an arbitrator's refusal to adjourn the proceedings at the behest of one party cannot be said to be perverse, keeping in mind the object of speedy resolution of disputes of the Arbitration Act." Further, Chatterjee J did not advert to the *Minmetals* test, which is that HCL was never unable to present its case as it was at no time outside its control to furnish documents and legal submissions within the time given by the arbitrator.

(d) He emphasized that "HCL *chose* not to appear before the arbitrator, and thereafter *chose* to submit documents and legal submissions outside the timelines granted by the arbitrator."

B3. HCL was unable to present its case because the arbitrator did not heed the stay order of the Rajasthan High Court (dated 27 April 2000)

Nariman J concluded that, first and foremost, the stay order of the Rajasthan High Court was not and could not be directed against the arbitrator – it was directed only against the parties. Secondly, the arbitrator initially began the proceedings after the green signal given to him by the ICC Court to proceed with the arbitration. The procedural timetable was reiterated when the Supreme Court had vacated the stay order passed by the Rajasthan High Court.

B4. The Arbitrator did not decide the issue of jurisdiction as a preliminary issue

HCL argued that jurisdiction was to be taken as a preliminary question before the arbitrator, but he did not. Nariman J rejected this argument saying it had never been taken before.

[2] Lastly Nariman J added that even otherwise, remanding the matter to the ICC arbitrator to pass a fresh award was clearly outside the jurisdiction of an enforcing court under Section 48 ACA.

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C. The law on Section 48 generally and on Section 48 (1) (b)

The authorities are referred to in *Centrotrade III* in the earlier part while narrating the facts and the argument of the parties. In conclusion, they are referred to in a general fashion (" …authorities / judgments referred to by us hereinabove"). For convenience, the authorities the court discussed are described in one section here.

C1. "Parameters of a Section 48 challenge"

On the "parameters of a Section 48 challenge", Nariman J referred to the 3-judge bench judgment in *Vijay Karia and others* v. *Prysmian Cavi E Sistemi SRL and others*, 2020 SCC OnLine SC 177. He first said that the *Karia* court had considered it "important to note that no challenge was made to the … award under the English arbitration law, though available." HCL, too had not challenged the award.

Then, he referred to paragraph 24 of *Karia*, where the court had considered the 'parameter' and noted that:

(a) It is important to emphasize that the legislative policy provides only one bite at the cherry, and there is no appeal against a judgment recognizing and enforcing a foreign award. This aligns with the policy under New York Convention for a person to enjoy the fruits of an award that has been unsuccessfully challenged in the country of its origin.

(b) The Supreme Court's jurisdiction under Article 136 should not be used to circumvent the legislative policy. Given the restricted parameters of Article 136, in cases where no appeal is granted against a judgment that recognizes and enforces a foreign award, the Supreme Court should be very slow in interfering with such decisions. It should entertain an appeal only with a view to settle the law if some new or unique point is raised which has not been answered by the Supreme Court before.

(c) Also, it would only be in a very exceptional case of a blatant disregard of Section 48 of the Arbitration Act that the Supreme Court would interfere with a judgment which recognises and enforces a foreign award, however inelegantly drafted the decision may be.

C2. "Otherwise, unable to present his case": Inability

Considering the meaning of the expression "otherwise unable to present his case", *Karia* had referred to:

(a) An English judgment of *Minmetals Germany GmbH* v. *Ferco Steel Ltd.,* (1999) C.L.C. 647;

(b) A judgment of the US District Court in Pennsylvania in *Jorf Lasfar Energy Co.* v. *AMCI Export Corp.*,2008 WL 1228930;

(c) And a judgment of the Singapore High Court in *Dongwoo Mann+Hummel Co. Ltd.* v. *Mann+Hummel GmbH*, (2008) SGHC 275.

In *Minmetals*, the inability to present one's case meant "at least that the enforcee has been prevented from presenting his case by matters outside his control."

Jorf Lasfar Energy had ruled that if a party fails to obey procedural orders given by the arbitrator, it must suffer the consequences.

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In *Dongwoo*, a party did not produce a document. The tribunal decided not to draw any adverse inference. The court ruled that Dongwoo had full opportunity to convince the tribunal, but it failed. Then the law was summed in *Karia* at paragraph 84 (SCC OnLine version), concluding that:

(a) The expression "was otherwise unable to present his case" cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase. In short, this expression would be a facet of natural justice. It would be breached only if the arbitrator did not give a fair hearing to the parties.

(b) The expression would apply at the hearing stage and not after the award has been delivered.

(c) [Citing to *Ssangyong Engineering & Construction Co. Ltd.* v. *National Highways Authority of India*, (2019) 15 SCC 131] A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party's control have combined to deny the party a fair hearing.

(d) Thus, where no opportunity was given to deal with an argument that goes to the root of the case or findings based on evidence that go behind the back of the party and which results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award liable to be set aside on the ground that a party has been unable to present his case.

(e) This must, of course, be with the caveat that such breach is clearly made out on the facts of a given case and that awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48.

The court also referred to three judgments under the 1940 Act. It said they are "also instructive" because one of the grounds on which a domestic award could be set aside under Section 30 of the 1940 Act was when the arbitrator misconducted himself or the proceedings. Nariman J first said that "misconduct" as a ground for setting aside an award is conceptually much wider than a party being unable to present its case before the arbitrator, which is contained in Section 48(1)(b). Then he noted *Ganges Waterproof Works (P) Ltd.* v. *Union of India*, (1999) 4 SCC 33[3]; *Sohan Lal Gupta* v. *Asha Devi Gupta*, (2003) 7 SCC 492[4]; and *Hari Om Maheshwari* v. *Vinit Kumar Parikh*, (2005) 1 SCC 379[5]. These three cases too emphasized on parties' choice.

Then from paragraphs 35 to 42, the court referred to several judgments cited by Centrotrade's counsel before it turned at paragraph 44 "to the facts of the present case:"

[3] No evidence led to substantiate the plea that there was a violation of natural justice.

[4] "A party has no absolute right to insist on his convenience being consulted in every respect … Court will intervene only in the event of positive abuse …If a party, after being given proper notice, chooses not to appear, then the proceedings may properly continue in his absence … The appellant must show that he was otherwise unable to present his case which would mean that the matters were outside his control and not because of his own failure to take advantage of an opportunity duly accorded to him."

[5] "Grant or refusal of an adjournment by an arbitrator comes within the parameters of Section 30 of the [1940] Act … the arbitrator's refusal of an adjournment sought in 1999 in an arbitration proceeding pending since 1995 cannot at all be said to be perverse keeping in mind the object of the Act as an alternate dispute resolution system aimed at speedy resolution of disputes."

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(a) *Cuckurova Holding AS* v. *Sonera Holding B.V.*, (2014) UKPC 15, a judgment of the Privy Council, which referred to the *Minmetals* test and the pro-enforcement bias of the New York Convention.

(b) *Eastern European Engineering Ltd.* v. *Vijay Consulting*, (2019) 1 LLR 1 (QBD), a judgment of the Queen's Bench Division, which said that "party challenging the award must also demonstrate that the outcome of the arbitration would have been different had there been no breach of natural justice."

(c) *Jorf Lasfar* (supra), where the court said that "a party cannot purposefully ignore the procedural directives of a decision-making body, and then successfully claim that the procedures were fundamentally unfair, or violated due process."

(d) *Consorcio Rive* v. *Briggs of Cancun, Inc.*, 134 F. Supp 2d 789, a decision of the US District Court, ED Louisiana, where Briggs of Cancun, a corporation, refused to participate in the arbitration due to alleged criminal proceedings pending in Cancun. The court found that Briggs of Cancun was not "unable to present its case" because it could have participated by means other than its representative David Briggs's physical presence at the arbitration. For instance, it could have sent another company representative to attend; it could have sent its attorney to attend, or David Briggs could have attended by telephone.

(e) *Four Seasons Hotels* v. *Consorcio Barr SA*, 613 Supp 2d 1362 (SD Fla. 2009), a judgement of the US District Court, SD Florida, where the respondent, having discontinued its participation in the arbitral proceedings just before the final evidential hearings, was held not have been unable to present its case.

(f) *Nanjing Cereals* v. *Luckmate Commodities*, XXI YB Comm. Arb. 542 (1996), a judgment of the Supreme Court of Hong Kong, where the court found that the defendant had an opportunity, but it did not avail it, and "all proceedings must have a finite end."

(g) *De Maio Giuseppe* v. *Interskins*, YB Comm. Arb. XXVII (2002) 492, a decision of the Supreme Court of Italy, where the court concluded that the defense concerned "the impossibility rather than the difficulty to present one's case."

C3. "Otherwise, unable to present his case": Otherwise

HCL's exact argument is not set out in the judgment of Nariman J, but he notes that HCL's counsel "took exception to the interpretation of the word "otherwise" occurring in Section 48(1)(b) and cited a Constitution Bench judgment of this court in *Kavalappara Kottarathil Kochuni* v. *States of Madras and Kerala*, (1960) 3 SCR 887, for the proposition that the expression "otherwise" cannot be read *ejusdem generis* with words that precede it."[6]

The argument was rejected, concluding that in paragraph 76 of *Karia*, the narrower meaning of Section 48 has been preferred, which aligns with the pro-enforcement bias of Section 48. Also, the *Kochuni case* dealt with an entirely different enactment.

[6] The argument appears to be that the phrase "otherwise" would cover cases apart from the natural justice argument.

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