

Case Comment on:

Centro trade Minerals and Metal Inc.

Vs.

Hindustan Copper Ltd.

K. Vanmathi¹

Introduction

The instant case is also known as Centrotrade case and it is a landmark case in the area of arbitration. This case established that two tier arbitration is valid one and it is not against public policy. There is a reason for being as a landmark case is because of its long history and the number of hearings and judgement issued since 2001. The supreme court in this case not only stated its position on two tire arbitration, but also expressed its confidence in pro arbitration attitude. This case also dealt under section 44 of the arbitration and

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conciliation act 1996, which defines a foreign award. The two tier procedure allows a party who is unsatisfied with the initial award can file an appeal against it, and the appeal is considered whole again on the merits of the case. It is important to note that the second award is binding on parties subject to any appeal the parties may have under the arbitration and conciliation act.

Facts

1. The case has a very long history and it begun when both parties had entered into a contract on January 16. 1996 for sale of 15,000 DMT of copper contract and it has to be delivered at kandla port in two separate consignments. After delivery all the payments were made in accordance with the contract.
2. The copper concentrate was to be used by the HCL at khetri industry. In clause 14 of the contract they mentioned about an arbitration agreement. The clause stated that in case of a dispute, Arbitration proceeding must begin in India to resolve the dispute.
3. But if either of the parties are unsatisfied by the same, they may appeal for a second arbitration to be held at the International Court of Arbitration in London, where the arbitration will be conducted in

accordance with the ICC (International Chamber of Commerce). Later a dispute arose between parties with respect to dry weight of concrete copper and the Centrotrade (Appellant) invoked the arbitration clause before the arbitrator who was appointed by Indian Council of Arbitration and he gave a Nil Award.

4. Aggrieved by the Award, the Centrotrade (appellant) appealed for a second arbitration at ICC, London. Jeremy Cook was selected as the International Chamber of Commerce's arbitrator.

5. HCL (respondent) filed a suit in the Court of Khetri in the State of Rajasthan challenging the two - tier arbitration clause before even getting judgement from the ICC. Later dissatisfied with the rulings, again HCL filed a revision case in the court of Rajasthan against the khetri's court's decision.

6. The High Court of Rajasthan barred HCL from further participation in the London arbitration. On 8.2.2001 the Hon'ble Supreme Court revoked the injunction which was imposed on HCL and after that Mr. Jeremy Cook made a judgement 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 an adequate chance to be heard?
3. Whether sec 48(1) (b), was appropriately interpreted?

Arguments of the parties

1. The fundamental objection was that the arbitration and conciliation act of 1996 did not provide for an appellate arbitration, hence there was no opportunity for second arbitration in India. While working this question Hon'ble Supreme Court relied on UNCITRAL working model reports.
2. A model legislation, according to this, must not exclude the use of two tier arbitration system. The Hon'ble court further stated that, this system existed before to the enactment of the arbitration legislation and the act makes no mention of any objection to it, so it cannot be prohibited.
3. The second point of contention was party autonomy under section 34 of the act. Section 34 allows for a request to vacate an

arbitral award. It was argued that only courts with jurisdiction may overturn on arbitral award.

4. The court noted that the availability of legal remedy does not preclude the parties from arguing on an alternate method of appealing the arbitral award. The court also determined that the appellate arbitration clause does not violate basic policy since nothing in the arbitration act prohibits two tier arbitration.

5. Finally, section 48 addresses the failure to enforce a foreign award. Section 48(1) (b) deals with lack of sufficient notice, which means that the party against whom the award is made was not given proper notice of the appointment of an arbitrator, the arbitral procedure and was unable to state its case.

Judgement

S.B. Sinha J. and Tarun Chatterjee J. issued the first ruling in the centrotrade and HCL case in 2006, discussing the permissibility of two tier arbitration. This case resulted in a split decision:

RULING 1: Due to the absence of an appeal system in the Arbitration and Conciliation Act, 1996 ("Act"), Judge Sinha concluded that a two-tiered arbitration was against public policy and hence invalid (under Section 23 of the Indian Contract Act, 1872). Thus, it was

impossible to enforce the foreign award. Instead, Judge Chatterjee reached the conclusion that the ICC award constituted a foreign award, the two-tiered arbitration provision was legitimate and enforceable, and the ICC tribunal was authorised to hear the appeal of the Indian award. Nevertheless, Judge Chatterjee also came to the conclusion that HCL had not been given enough time to submit its case, and as a result, the ICC award was not enforceable under the Act. This judgement can be called as *Centrotrade 1*.

RULING 2: As a result of the judges' disagreements, the case was taken before a three-judge panel of the Supreme Court, who decided that the parties are allowed to enter into an agreement that allows for non-statutory appeals in order to resolve their disagreements and conflicts outside of the legal system. Moreover, it was noted that the Act does not forbid a two-tier system and does not restrict the parties' liberty to mutually agree on a process by which an award can be examined by another arbitrator through an admissible appeal, subject to an Act challenge. The Apex Court found that there was no issue in upholding the parties' joint choice and acknowledging the legitimacy of their agreement because this was exactly what they had agreed upon. However, the Court declined to address the ICC Award's real enforcement as a foreign award, focusing instead solely on the issue

of the constitutionality of a two-tier arbitration provision. Due to its workload, which only sometimes permitted it to consider appeals, the Court indicated that the matter will be laid down for hearing on the remaining issue at a later time. The judgement by a three judge is also known as Centrotrade 2

RULING 3: the third and final judgement in this series was primarily concerned with Hindustan Copper Limited's inability to state its case and the implementation of an ex-parte during ruling in India. The court determined that HCL was given an adequate chance to be heard and that an ex-parte decree is enforceable in India. This judgement is called as centrotrade 3.

Analysis and Conclusion

This case is a remarkable example of the Hon'ble Supreme Court of India's pro arbitration stance. Justice Nariman has even drawn on international judgements to back up his decision, the court established effective norms and regulations which also sending a strong statement that India as a country had taken a pro arbitration stance. The court also upheld India's commitment under the New

York convention, whose goal was to ease the execution of international arbitral award.

The court reading section 48 has rendered the section watertight narrow interpretation section 48 in the execution of an arbitral judgement, but a broad interpretation would be contrary to the goal of New York convention. The defence of a natural justice might have been abused by a party who purposefully avoiding participating in the proceeding. The decision ensure that this gap is or will no longer be misused

Finally, the current jurisprudential tendency, which includes the imposition of high fees will help deter obstinate award debtors from making meritless challenges. Nevertheless, there is more. The approach to enforcement, starting with district courts, needs to shift fundamentally. Even one of the rulings is undoubtedly a start in the right direction, it's possible that this shift may take some time. Even though it took a while, the Court's ruling in favour of enforcement will be a positive precedent for arbitration in India.