REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2562 OF 2006

M/S. CENTROTRADE MINERALS AND METALS INC. …APPELLANT

VERSUS

HINDUSTAN COPPER LTD. ...RESPONDENT

WITH

CIVIL APPEAL NO.2564 OF 2006

J U D G M E N T

R.F. Nariman, J.

1. This matter comes to this Bench after two previous forays to this Court.

2. The appellant before us, in Civil Appeal No.2562 of 2006, is a U.S. Corporation who had entered into a contract for sale of 15,500 DMT of copper concentrate to be delivered at the Kandla Port in the State of Gujarat, the said goods to be used at the Khetri Plant of the respondent Hindustan Copper Ltd. (hereinafter referred to as "HCL"/ "the respondent"), who is the appellant in the other Civil Appeal No.2564 of 2006. After all consignments were delivered, payments had been made in accordance with the contract. However, a dispute arose between the

parties as regards the quantity of dry weight of copper concentrate delivered. Clause 14 of the agreement contained a two-tier arbitration agreement by which the first tier was to be settled by arbitration in India. If either party disagrees with the result, that party will have the right to appeal to a second arbitration to be held by the ICC in London. The appellant M/s Centrotrade Minerals and Metals Inc. (hereinafter referred to as "Centrotrade"/ "the appellant") invoked the arbitration clause. By an award dated 15.06.1999 the arbitrator appointed by the Indian Council of Arbitration made a Nil Award. Thereupon, Centrotrade invoked the second part of the arbitration agreement, as a result of which Jeremy Cook QC, appointed by the ICC, delivered an award in London, dated 29.09.2001, in which the following amounts were awarded:

> "27. For the above reasons I THEREFORE AWARD and ADJUDGE that
>
> (1) HCL do pay Centrotrade the sum of $152,112.33, inclusive of interest to the date of the Award in respect of the purchase price for the first shipment.
>
> (2) HCL do pay Centrotrade the sum of $15,815.59, inclusive of interest to the date of this Award in respect of demurrage due on the first shipment.
>
> (3) HCL, do pay Centrotrade the sum of $284,653.53, inclusive of interest to the date of this Award in respect of the purchase price on the second shipment.
>
> (4) HCL do pay Centrotrade their legal costs in this arbitration in the sum of $82,733 and in addition the

costs of the International Court of Arbitration, the Arbitrator's fees and expenses totalling $29,000.

(5) HCL do pay Centrotrade compound interest on the above sums from the date of this Award at 6% p.a. with quarterly rests until the date of actual payment."

3. Even before Jeremy Cook QC could deliver his award, HCL, during the pendency of the proceedings before the arbitrator in London, filed a suit in the Court at Khetri, in the State of Rajasthan, challenging the arbitration clause. By an Order dated 27.04.2000, in a revision petition filed against the Order of the Khetri Court, the High Court at Rajasthan restrained the appellant from taking further steps in the London arbitration, pending hearing and disposal of the revision petition. This *ad interim ex parte* stay granted by the High Court was ultimately vacated by the Supreme Court only on 08.02.2001. Meanwhile, we are reliably informed that Mr. Cook, the learned arbitrator, referred the matter of stay of the parties from proceeding with the London arbitration to the ICC Court, which then decided that the arbitrator could continue with the arbitral proceedings.

4. When the said award dated 29.09.2001 was sought to be enforced by Centrotrade in India, a learned Single Judge of the Calcutta High Court, after considering the objections of HCL, dismissed the Section 48 petition filed by HCL, as a result of which the aforesaid foreign award became executable in India. However, a Division Bench of the Calcutta

High Court, by its judgment dated 28.07.2004, held that an appeal would be maintainable inasmuch as the London award could not be said to be a foreign award, but that a two-tier arbitration clause would be valid. However, since the Indian award and the London Award, being arbitration awards by arbitrators who had concurrent jurisdiction, were mutually destructive of each other, neither could be enforced, as a result of which the appeal was allowed and the judgment of the learned single Judge was set aside.

5. At this juncture, the matter came to a Division Bench of this Court. Two separate judgments were delivered by S.B. Sinha, J. and Tarun Chatterjee, J. reported in **Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.** (2006) 11 SCC 245. After setting out the facts of the case, S.B. Sinha,J. held that a two tier clause of the kind contained in clause 14 of this agreement is *non est* in the eye of law and would be invalid under Section 23 of the Indian Contract Act. In this view of the matter, the foreign award could not enforced in India and Centrotrade's appeal was therefore dismissed, the appeal filed by HCL being allowed. Tarun Chatterjee, J. set out four questions in paragraph 134 as follows:

> "**134.** We have heard Mr Sarkar, learned Senior Counsel appearing for Centrotrade and Mr Debabrata Ray Choudhury, learned Senior Counsel for HCL. I have also examined the entire material on record including the arbitration agreement, the awards and

> judgments of the Division Bench as well as the learned Single Judge. Before us, the following issues were raised by the learned counsel for the parties for decision in the appeals:
>
> (*1*) Whether the second part of clause 14 of the agreement providing for a two-tier arbitration was valid and permissible in India under the Act?
>
> (*2*) If it is valid, on the interpretation of clause 14 of the agreement, can it be said that the ICC arbitrator sat in appeal against the award of the Indian arbitrator?
>
> (*3*) Whether the ICC award is a foreign award or not?
>
> (*4*) Whether HCL was given proper opportunity to present its case before the ICC arbitrator?"

6. These questions were answered by stating that the two-tier arbitration process was valid and permissible in Indian law; that the ICC arbitrator sat in appeal against the award of the Indian arbitrator; that the ICC award was a foreign award; but that since HCL was not given a proper opportunity to present its case before the ICC arbitrator, Centrotrade's appeal would have to be dismissed and HCL's appeal allowed.

7. The matter then came on a reference before a 3-Judge bench of this Court and is reported in **Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.** (2017) 2 SCC 228. The reference order was referred to in paragraph 1 of the judgment of Lokur,J., as follows:

> "These appeals have been referred [*Centrotrade Minerals & Metals Inc.* v. *Hindustan Copper Ltd.*, (2006) 11 SCC 245] to a Bench of three Judges in view of a difference of opinion between the two learned Judges of this Court. The controversy is best understood by referring to the proceedings recorded on 9-5-2006:

Hon'ble Mr Justice S.B. Sinha pronounced his Lordship's judgment of the Bench comprising his Lordship and Hon'ble Mr Justice Tarun Chatterjee.

Leave granted. For the reasons mentioned in the signed judgment, civil appeal arising out of SLP (C) No. 18611 of 2004 filed by M/s Centrotrade Minerals and Metal Inc., is dismissed and civil appeal arising out of SLP (C) No. 21340 of 2005 (actually 2004) preferred by Hindustan Copper Ltd. is allowed. In the peculiar facts and circumstances of the case, the parties shall pay and bear their own costs. Hon'ble Mr Justice Tarun Chatterjee pronounced his Lordship's judgment disposing of the appeals in terms of the signed judgment. In view of difference of opinion, the matter is referred to a larger Bench for consideration. The Registry of this Court shall place the matter before the Hon'ble the Chief Justice for constitution of a larger Bench.

The decisions rendered by Sinha and Chatterjee, JJ. are reported as *Centrotrade Minerals & Metals Inc.* v. *Hindustan Copper Ltd.* [*Centrotrade Minerals & Metals Inc.* v. *Hindustan Copper Ltd.*, (2006) 11 SCC 245]"

Paragraph 5 of the aforesaid judgment set out the two questions that arose in this case as follows:

"**5.** The issues that have arisen for our consideration, as a result of the difference of opinion between the learned Judges, are as under:

(*1*) Whether a settlement of disputes or differences through a two-tier arbitration procedure as provided for in Clause 14 of the contract between the parties is permissible under the laws of India?

(*2*) Assuming that a two-tier arbitration procedure is permissible under the laws of India, whether the award rendered in the appellate arbitration being a "foreign award" is liable to be enforced under the provisions of Section 48 of the Arbitration and Conciliation Act, 1996

> at the instance of Centrotrade? If so, what is the relief that Centrotrade is entitled to?
>
> For the present, we propose to address only the first question and depending upon the answer, the appeals would be set down for hearing on the remaining issue. 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."

Since the first question was answered in the affirmative, the Court concluded:

> "***Conclusion***
>
> **48.** In view of the above, the first question before us is answered in the affirmative. The appeals should be listed again for consideration of the second question which relates to the enforcement of the appellate award."

8. This is how the appeals have been listed again for consideration of the second question, which relates to enforcement of the London award.

9. Shri Gourab Banerjee, learned senior counsel appearing on behalf of Centrotrade, has taken us through the record and has relied strongly on this Court's recent judgment in **Vijay Karia v. Prsymian Cavi E Sistemi SRL** 2020 (3) SCALE 494. He then referred in detail to the portions of the award which dealt with the natural justice aspect of the case, as well as the judgment of the Single Judge of the Calcutta High Court which dealt with the same. He then read out to us Chatterjee J's views contained in **Centrotrade [2006]** (supra) and contended that ample opportunity had been given by the arbitrator to HCL to present its case,

but that HCL, having an Indian award in its pocket, wanted somehow to abort the London arbitration proceedings. It first filed the suit that has been referred to, and obtained ex *parte ad interim* stay against parties from proceeding in the arbitration on 27.04.2000, which was vacated by the Supreme Court only on 08.02.2001. Jeremy Cook QC afforded as many as six opportunities to HCL to present its case and bent over backwards by extending time for filing of submissions and documents several times, and even considered documents that were filed by HCL after the last deadline had been extended, and then passed the award. He, therefore, attacked Chatterjee J's judgment, stating that it was factually incorrect when it stated that a fair opportunity had not been given to HCL to present its case. Several other judgments both Indian and foreign were cited by Shri Banerjee in support of his submission. Apart from relying heavily on the judgment in **Vijay Karia** (supra), he relied upon the approach to a Section 48 proceeding by quoting from *Redfern and Hunter on International Arbitration* 6th Edn. and *Merkin and Flannery on the Arbitration Act, 1996*.

10. Shri Harin P. Raval, learned senior counsel appearing on behalf of HCL, has taken a preliminary submission that the only point of difference between S.B. Sinha,J. and Tarun Chatterjee,J. was on whether the two-tier arbitration clause was valid in law. Once that point had been answered, the question of being unable to present one's case, not

having been decided by S.B. Sinha, J., was not referred to the larger bench as there was no difference of opinion between the learned Judges on this aspect and therefore this aspect cannot now be adjudicated upon. Even otherwise, he argued, basing his submissions on a list of dates and a paper book of documents filed before this Court for the first time, to show that as a matter of fact once the arbitrator had extended time, the last extension being till 12.09.2001, he ought to have allowed further time in which, apart from legal submissions furnished, documents could have been furnished in support of HCL's case. This is particularly in view of the fact that on 11.09.2001, a terrorist attack had taken place in New York as a result of which globally, there was disruption of transport and communication, and therefore it was very difficult for HCL to send documents within the requisite time. He argued that had such documents been seen, there can be no doubt that this one-sided award might well have been in his client's favour, as a result of which serious prejudice had been caused to his clients. Even otherwise, he argued that the issue of jurisdiction was to be taken as a preliminary question before the learned arbitrator, after which further proceedings were to take place. This was never done by the learned arbitrator. Also, the learned arbitrator in proceeding with the arbitration despite the *ex parte ad interim* stay being granted by an Indian court

resulted in his client being unable to present his case before the arbitrator.

11. Having heard learned senior advocates for both parties, it is first necessary to set out the portions of the award dated 29.09.2001 which deal with the aspect of HCL being unable to present its case before the learned arbitrator. The learned arbitrator, after referring to the Rajasthan High Court proceedings and the Supreme Court's vacation of the stay, then found:

> "7. As set out in paragraph 6 above, HCL, by a series of letters to the International Court of Arbitration and to me, in my capacity as arbitrator, maintained that any arbitration commenced under the second paragraph of Clause 14 of the contract is null and void and until August 2001, refused to participate in it, even though they were invited by me to do so without prejudice to their jurisdictional objections. Despite this stance, Fox & Mandal were at all times consulted about the procedural aspects of this arbitration, were asked for their submissions in relation to the procedure, progress and substance of the dispute, received copies of all correspondence passing between Centrotrade and myself and of all submissions made and have been given every opportunity to take any point which they wished to take in their defence. By Orders made on 20th December 2000, 19th January 2001 and 3rd May 2001, I directed that Centrotrade serve submissions and supporting evidence, followed by HCL's Response and evidence in support, with a right in Centrotrade to put in a reply in accordance with a clear timetable. When no Defence Submissions or supporting evidence was served by HCL within the time prescribed, I sent them a fax on 30th July 2001,giving them one last opportunity to inform me by return of any intention on their part to put in a Defence and to seek an extension of time for doing so.

8. Following a further fax on 9th August 2001, in which I informed the parties that I was proceeding with the Award, on 11th August I received a fax from Fox & Mandal requesting an extension of time of one month to put in a defence. On 16th August I ordered that any submissions in support of an application for an extension of time for a defence and any submissions on the substantive merits of the dispute, together with any evidence relied on in relation to the application and any submissions should be received by me by 31st August 2001, in the absence of which I would not give them any consideration. On 27th August Fox & Mandal sought a further 3 weeks' extension of time for making their submissions and serving supporting evidence. I allowed a final extension for these submissions and evidence until 12th September 2001. Seventy - five pages of submissions were received by me on 13th September 2001, without any supporting evidence or any justification for not complying with my earlier orders. No grounds were put forward for any application for an extension of time for putting in Defence submissions. Indeed no formal application was made for an extension of time to do so. HCL have therefore not attempted to justify their earlier stance nor to give me any reason for considering their submissions on the merits which are made out of time. Centrotrade have objected to these submissions contending that they are inadmissible because of HCL's persistent breaches of my orders. Nonetheless, though not bound to do so because of their belated nature, I have considered those submissions and taken them fully into account in making this Award. I made plain in my orders that no further material provided thereafter would be taken into account, and I have not done so.

9. In their submissions HCL maintained their arguments as to lack of jurisdiction and the invalidity of this London Arbitration but without prejudice to that, put forward submissions both on the jurisdictional arguments, the nullity of the second paragraph of the Arbitration clause in the contract and on the merits of the dispute. It is clear that this dispute can be determined on the documents

turning, as it does essentially on points of construction of the contract and matters of Indian law."

(emphasis supplied)

Ultimately, the arbitrator awarded costs for the London proceeding, declining to award costs for the arbitration that had taken place in India.

12. The learned Single Judge of the Calcutta High Court, while dealing with the objections as to breach of natural justice, dismissed the aforesaid objections as follows:

> "Mr. Roy Choudhury then submits that in view of Section 48(1)(b) of the Act, the award is not enforceable, as neither notice of appointment of arbitrator was given to the respondent, nor was it given opportunity to present its case. The arbitrator followed the ICC Arbitration and Conciliation Rules, though they were not mentioned by the parties in the arbitration agreement, hence in view of Section 48(1)(b) of the Act the award was not enforceable.
>
> Mr. Sarkar replies that the respondent was given all opportunities to present its case, but it showed total non-cooperation with the arbitrator. The arbitral procedure followed by the arbitrator does not militate against the arbitration agreement.
>
> I find that the petitioner approached the ICC International Court of Arbitration on February 22nd, 2000. The respondent filed a suit in the Court of Civil Judge, Junior Division, Khetry on March 28th 2000; it wanted to stop the second arbitration in terms of the arbitration agreement. The arbitrator was appointed on June 7th, 2000. Till August 2001 the respondent maintained that the second part of the arbitration agreement being against the public policy of India, the arbitration through the ICC International Court of Arbitration was not permissible. On this ground the respondent refused to participate in the arbitral proceeding. It took the matter upto the Apex Court.

> Ultimately when it failed to obtain any order to stop the arbitration, it filed its submissions running into seventy-five pages. Though the papers reached the arbitrator beyond the stipulated date, he has considered such submissions. He, however, did not find any merit in the case made out by the respondent. The arbitrator has recorded that at every stage he consulted the procedural aspects with the solicitors representing the respondent. There is no proof that the respondent ever objected to the rules and procedure followed by the arbitrator or that the arbitrator followed a procedure not contemplated in the agreement. It is apparent from the award that all opportunities were given to the respondent to present its case. I find no merit in the contentions that notice regarding appointment of the arbitrator was not given to the respondent or that the terms of reference were settled behind its back. The respondent had full knowledge of everything; it was informed about everything. Hence I find no substance in the grievance that the respondent was unable to present its case or that procedure not contemplated by the agreement of the parties was followed by the arbitrator."

13. In appeal, the Division Bench, in view of its finding that the award is not a foreign award, declined to apply Section 50 of the Arbitration Act, 1996 (hereinafter referred to as "Arbitration Act"), and then stated that the London award is declared to be inexecutable so long as the Indian Nil Award stands. In view of this finding, it did not go into the natural justice point argued by HCL.

14. In the first round in this court, S.B. Sinha,J. did not go into the natural justice point, in view of his finding that the arbitration clause itself was null and void. Chatterjee,J., after agreeing with Centrotrade's case on the arbitration clause, then went into issue no. 4 and held as follows:

*"**Issue 4***

Whether HCL was given proper opportunity to present its case before the ICC arbitrator?

164. Under Section 48(1)(*b*) enforcement of a foreign award can be refused if:

"48. (1)(*b*) 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*;" (emphasis supplied)

165. In the case at hand, HCL had the knowledge of appointment of the arbitrator. In fact, it had approached the Indian courts to stall the ICC arbitral proceedings. On a special leave petition filed by Centrotrade against the order of the Rajasthan High Court staying the ICC arbitral proceedings, an order was passed by this Court by which the stay order of the Rajasthan High Court was vacated on 8-2-2001 and directions were given for the ICC proceedings to continue in accordance with law.

166. It is true, in his award, Mr Jeremy Lionel Cooke, the ICC arbitrator has noted that he was appointed by ICC on 7-6-2000 and that HCL refused to participate in the arbitral proceedings on the ground that the second arbitration clause in the contract was null and void. He directed Centrotrade and HCL to file submissions and supporting evidence through orders dated 20-12-2000, 19-1-2001 and 3-5-2001. However, HCL did not comply with these orders. On 30-7-2001, he sent a fax to HCL to find out whether they intended to file their defence. He sent a further fax on 9-8-2001 *informing them that he was proceeding with the award*. (emphasis supplied) Then on 11-8-2001, the ICC arbitrator received a reply seeking extension of time. He granted time till 31-8-2001. He received another request from HCL's representatives on 27-8-2001 for further extension of time. He granted extension till 12-9-2001. He received the first set of submissions filed by HCL, without supporting evidence, on 13-9-2001. He considered those submissions and took them into account while

making the award. He has further recorded in his award that:

"I made plain in my orders that no further material provided thereafter would be taken into account, *and I have not done so.*"

(emphasis supplied)

This last statement indicates that he received further material from HCL, which he did not consider while making the award. On the face of it, it seems that HCL was given sufficient opportunity to present its case by the arbitrator. However, this question must be looked into from the then existing situation.

167. It must be noted that this Court vacated the stay on the proceedings on 8-2-2001. The first direction of the ICC arbitrator to the parties, after the order of this Court on 8-2-2001, to serve submissions to him was made on 3-5-2001 i.e. after a time gap of nearly 3 months. Cooperation of HCL was next requested only on 30-7-2001 i.e. after a time gap of nearly 2 months. Then the communication on 9-8-2001 stated that the arbitrator was proceeding with the award. This time there was a response from HCL. Upon these requests, a time-limit of nearly one month ending on 12-9-2001 was given to HCL. The arbitrator received the first set of submissions filed by HCL on 13-9-2001. Then he made the award 16 days later on 29-9-2001. It seems that between 13-9-2001 and 29-9-2001, he did receive further material from HCL which he did not consider while making the award on the ground that they were received after the time-limit granted by him to HCL had lapsed.

168. It is clear from the above layout of facts that there have been delays in the arbitral proceedings right from the beginning when Centrotrade approached ICC on 22-2-2000. Most of the delays were due to HCL's refusal to participate in the proceedings. However, there were some delays which cannot be related to HCL's conduct. For instance, the period from 8-2-2001 when the order of this Court was made to 3-5-2001 when the first direction of the arbitrator was made. The

whole arbitral proceeding was conducted in a manner indicative of lack of urgency. Further, I find merit in the submission of HCL that due to the total dislocation of air traffic caused by the terrorist attack of 11-9-2001, the materials sent by HCL to the ICC arbitrator reached late. Under these circumstances, a delay of few days in serving their submissions with supporting evidence, after having accepted to participate in the arbitral proceedings, seems excusable and should have been excused. Considering the overall picture of the circumstances and the delays, refusal of the arbitrator to consider the material received by him after 13-9-2001 and before 29-9-2001, seems to be based on a *frivolous technicality*. The arbitrator ought to have considered all the material received by him before he made the award on 29-9-2001. Considering the decisions in *Hari Om Maheshwari* v. *Vinitkumar Parikh* [(2005) 1 SCC 379] and *Minmetal Germany GmbH* v. *Ferco Steel Ltd.* [(1999) 1 All ER (Comm) 315] it is true 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, in the light of the delays, some of which were not attributable to HCL's conduct, it was only fair to excuse HCL's lapse in filing the relevant material on time. Therefore, it can be said that HCL did not get a fair hearing and could not effectively present its case.

169. For the reasons aforesaid, I am of the view that HCL could not effectively present its case before the ICC arbitrator and therefore enforcement of the ICC award should be refused in view of Section 48(1)(*b*) of the Act. Accordingly, the judgment of the Division Bench and also the judgment of the learned Single Judge of the Calcutta High Court must be set aside and the matter be remitted back to the ICC arbitrator for fresh disposal of the arbitral proceedings in accordance with law after giving fair and reasonable opportunity to both the parties to present their cases before him. In view of the fact that I have set aside the award of the ICC arbitrator on the ground that HCL was unable to effectively present its case before the ICC arbitrator, in compliance with Section 48(1)(*b*) of the Act, I direct the

> ICC arbitrator to pass a fresh award within three months from the date of commencement of the fresh arbitral proceedings."

15. The law on the subject matter of Section 48(1)(b) of the Arbitration Act has been laid down in a recent judgment of this Court in **Vijay Karia** (supra). In paragraph 21 of the aforesaid judgment, this Court stated that it was important to note that no challenge was made to the aforesaid award under the English arbitration law, though available, just as in the facts of the present case. This Court then set out the parameters of a Section 48 challenge which reaches this Court as follows:

> "**24.** Before referring to the wide ranging arguments on both sides, it is important to emphasise that, unlike Section 37 of the Arbitration Act, which is contained in Part I of the said Act, and which provides an appeal against either *setting aside* or *refusing to set aside* a 'domestic' arbitration award, the legislative policy so far as recognition and enforcement of foreign awards is that an appeal is provided against a judgment refusing to recognise and enforce a foreign award but not the other way around (i.e. an order recognising and enforcing an award). This is because the policy of the legislature is that there ought to be only one bite at the cherry in a case where objections are made to the foreign award on the extremely narrow grounds contained in Section 48 of the Act and which have been rejected. This is in consonance with the fact that India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (hereinafter referred to as "New York Convention") and intends - through this legislation - to ensure that a person who belongs to a Convention country, and who, in most cases, has gone through a challenge procedure to the said award in the country of its origin, must then be able to get such award recognised and enforced in India as soon as possible. This is so that such person

> may enjoy the fruits of an award which has been challenged and which challenge has been turned down in the country of its origin, subject to grounds to resist enforcement being made out under Section 48 of the Arbitration Act. Bearing this in mind, it is important to remember that the Supreme Court's jurisdiction under Article 136 should not be used to circumvent the legislative policy so contained. We are saying this because this matter has been argued for several days before us as if it was a first appeal from a judgment recognising and enforcing a foreign award. Given the restricted parameters of Article 136, it is important to note that in cases like the present - where no appeal is granted against a judgment which recognises and enforces a foreign award - this Court should be very slow in interfering with such judgments, and 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, so that the Supreme Court judgment may then be used to guide the course of future litigation in this regard. 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 judgment may be. With these prefatory remarks we may now go on to the submissions of counsel."

The Court then went on to refer to **Minmetals Germany GmbH v. Ferco Steel Ltd.** (1999) C.L.C. 647 in paragraph 59, and **Jorf Lasfar Energy Co. v. AMCI Export Corp.** 2008 WL 1228930 in paragraph 61 as follows:

> "**59.** The English judgments advocate applying the test of a person being prevented from presenting its case by matters outside his control. This was done in **Minmetals Germany GmbH v. Ferco Steel Ltd.** (1999) C.L.C. 647 as follows:

> "In my judgment, the inability to present a case to arbitrators within s.103(2)(c) contemplates at least that the enforcee has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcee has, due to matters within his control, not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not in my judgment, bring himself within that exception to enforcement under the convention. In the present case that is what has happened"

xxx xxx xxx

61. An application of this test is found in **Jorf Lasfar Energy Co. v. AMCI Export Corp.** 2008 WL 1228930, where the U.S District Court, W.D. Pennsylvania decided that if a party fails to obey procedural orders given by the arbitrator, it must suffer the consequences. If evidence is excluded because it is not submitted in accordance with a procedural order, a party cannot purposefully ignore the procedural directives of the decision-making body and then successfully claim that the procedures were unfair or violative of due process. Likewise, in **Dongwoo Mann+Hummel Co. Ltd. v. Mann+Hummel GmbH** (2008) SGHC 275, the Singapore High Court held:

> "**145.** A deliberate refusal to comply with a discovery order is not per se a contravention of public policy because the adversarial procedure in arbitration admits of the possible sanction of an adverse inference being drawn against the party that does not produce the document in question in compliance with an order. The tribunal will of course consider all the relevant facts and circumstances, and the submissions by the parties before the tribunal decides whether or not to draw an adverse inference for the non-production. Dongwoo also had the liberty to apply to the High Court to compel production of the documents under s 13 and 14 of the IAA, if it was not content with merely arguing on the question of

adverse inference and if it desperately needed the production by M+H of those documents for its inspection so that it could properly argue the point on drawing an adverse inference. However, Dongwoo chose not to do so.

146. Further, the present case was not one where a party hides even the existence of the damning document and then dishonestly denies its very existence so that the opposing party does not even have the chance to submit that an adverse inference ought to be drawn for non-production. M+H in fact disclosed the existence of the documents but gave reasons why it could not disclose them. Here, Dongwoo had the full opportunity to submit that an adverse inference ought to be drawn, but it failed to persuade the tribunal to draw the adverse inference. The tribunal examined the other evidence before it, considered the submissions of the parties and rightfully exercised its fact finding and decision making powers not to draw the adverse inference as it was entitled to do so. It would appear to me that the tribunal was doing nothing more than exercising its normal fact finding powers to determine whether or not an adverse inference ought to be drawn.""

The Court finally summed up its conclusion on this aspect of the case, as follows:

"**76.** Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, the expression "was otherwise unable to present his case" occurring in Section 48(1)(b) 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, which would be breached only if a fair hearing was not given by the arbitrator to the parties. Read along with the first part of Section 48(1)(b), it is clear that this expression would apply at the hearing stage and not after the award has been delivered, as has been held in **Ssangyong**

> (supra). 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. Thus, where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which 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. This must, of course, be with the caveat that such breach be 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."

16. Shri Raval 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.

17. **Kochuni**'s case (supra) was concerned with the constitutional validity of the Madras Marumakkathayam (Removal of Doubts) Act, 1955. Section 2(b) of the aforesaid Act reads as follows:

> "**2.** Notwithstanding any decision of Court, any sthanam in respect of which:
>
> (*b*) the members of the tarwad have been receiving maintenance from the properties purporting to be sthanam properties as of right, or in pursuance of a custom or otherwise"

The Constitution Bench then held:

> "The word "otherwise" in the context, it is contended, must be construed by applying the rule of *ejusdem generis*. The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified. But it is clearly laid down by decided case that the specific words must form a distinct genus or category. It is not an inviolable rule of law, but is only permissible inference in the absence of an indication to the contrary. On the basis of this rule, is contended, that the right or the custom mentioned in the clause is a distinct genus and the words "or otherwise" must be confined to things analogous to right or contract such as lost grant, immemorial user etc. It appears to us that the word "otherwise" in the context only means "whatever may be the origin of the receipt of maintenance". One of the objects of the legislation is to by-pass the decrees of courts and the Privy Council observed that the receipt of maintenance might even be out of bounty. It is most likely that a word of the widest amplitude was used to cover even acts of charity and bounty. If that be so, under the impugned Act even a payment of maintenance out of charity would destroy the character of an admitted sthanam which *ex facie* is expropriatory and unreasonable."

Given the object of the 1955 Act, the Constitution Bench was careful to state that the word "otherwise" in the context only means "whatever may be the origin of the receipt of maintenance".

18. P. Ramanatha Aiyar's *Advanced Law Lexicon* defines the expression "otherwise" as follows:

> "**Otherwise.** By other like means; contrarily; different from that to which it relates; in a different manner; in another way; in any other way; differently in other respects in different respects; in some other like capacity."

The Law Lexicon then refers to an early judgment of Cleasby B. in **Monck v. Hilton** 46 LJNC 167, in which it is stated as follows:

> "As a general rule "otherwise" when following an enumeration, should receive an *ejusdem generis* interpretation (*per* CLEASBY, B. *Monck* v. *Hilton*, 46 LJMC 167, The words 'or otherwise,' in law, when used as a general phrase following an enumeration of particulars, are commonly interpreted in a restricted sense, as referring to such other matters as are kindred to the classes before mentioned."

As has been held in paragraph 76 of **Vijay Karia** (supra), the context of Section 48 is recognition and enforcement of foreign awards under the New York Convention of 1958. Given the context of the New York Convention, and the fact that the expression "otherwise" is susceptible to two meanings, it is clear that the narrower meaning has been preferred, which is in consonance with the pro-enforcement bias spoken about by a large number of judgments referred to in **Vijay Karia** (supra). **Kochuni**'**s** case (supra) dealing with an entirely different Act with a different object cannot, therefore, possibly apply to construe this word in the setting in which it occurs.

19. As a matter of fact, three earlier judgments of this Court, all under the Arbitration Act, 1940, are also instructive. The ground on which a domestic award could be set aside under Section 30 of the 1940 Act, *inter alia*, was if the arbitrator misconducted himself or the proceedings. It will be seen 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). Thus, in **Ganges Waterproof Works (P) Ltd. v. Union of India** (1999) 4 SCC 33, this Court was faced with the legality and validity of the arbitration proceedings, three grounds being raised as follows:

> "**2.** Challenge to the legality and validity of the arbitration proceedings has been laid on three grounds: firstly, that the claimant-Union of India (respondent herein) filed an additional statement accompanied by documents before the arbitrator on 11-8-1982, which was the last day of hearing, and that was taken into consideration by the arbitrator without affording the petitioner an opportunity for contesting the same or even delivering a copy thereof to the petitioner; secondly, though no oral evidence was adduced by any of the parties, yet the arbitrator has in his award expressed having heard the evidence which shows inapplication of mind to the record of the proceedings and material available before the arbitrator; and thirdly, that the arbitrator in the sitting held on 11-8-1982 heard the parties hardly for five or seven minutes in which limited time, no real hearing could have taken place. It is submitted that the manner in which the arbitrator has conducted himself, has resulted in violation of the principles of natural justice and vitiated the arbitration proceedings. Similar grounds were raised before the learned Single Judge as also in the intra-court appeal before the High Court and have been turned down. Having heard the learned counsel for the parties, we are also of the opinion that here too the petitioner must meet the same fate."

So far as the first ground was concerned, it was held that as a matter of fact, nothing was filed by the Union of India on 11.08.1982 and the additional statement and documents that were filed by the Union of India before the learned arbitrator was way before on 31.05.1982. This being

so, and as no specific case was made out in an additional affidavit before the learned single Judge supporting the plea that the additional statement and documents that were furnished could not be effectively dealt with by the appellant, plea no.1 was turned down. The third contention was then disposed of as follows:

> "**6.** The third and the last plea urged is equally devoid of any merit. The burden of substantiating the averment urged as an objection tantamounting to misconduct on the part of the arbitrator or complaining of violation of the principles of natural justice was on the petitioner. No evidence was adduced to substantiate the plea. The best person to depose as to what had actually transpired at the hearing and whether the same was a real hearing or an eyewash merely was the counsel who actually made submissions on behalf of the petitioner before the arbitrator. The least that was expected of the petitioner was to have filed an affidavit of the counsel before the Court. That was not done. No timely protest was raised before the arbitrator. The hearing was concluded on 11-8-1982 and the award was made on 23-8-1982. During these 12 days also, the petitioner-Company never urged before the arbitrator that submissions on its behalf were not permitted to be made by the arbitrator. The learned Single Judge, as also the Division Bench, have arrived at a finding that the plea was an afterthought and certainly not substantiated. We also do not find any reason to take a view different from the one taken by the High Court."

20. In **Sohan Lal Gupta v. Asha Devi Gupta** (2003) 7 SCC 492, this Court dealt with the arbitrator misconducting the proceedings as follows:

> "**27.** The arbitrator, as appears from the minutes of the meeting, proceeded only on the documentary evidence. No party appears to have presented oral evidence. Thus, the question of cross-examination of the witnesses appearing on behalf of the other parties did

not arise. Submissions must have been made by the parties themselves. Ghanshyamdas Gupta does not say that he had difficulty in appearing on 15-6-1976 or any subsequent date and he had asked for an adjournment. Even otherwise, a party has no absolute right to insist on his convenience being consulted in every respect. The matter is within the discretion of the arbitrator and the Court will intervene only in the event of positive abuse. (See *Montrose Canned Foods Ltd.* [(1965) 1 Lloyd's Rep 597]) If a party, after being given proper notice, chooses not to appear, then the proceedings may properly continue in his absence. (See *British Oil and Cake Mills Ltd.* v. *Horace Battin & Co. Ltd.* [(1922) 13 LI L Rep 443])"

(emphasis supplied)

In a significant paragraph which foreshadowed the law as it is today, this Court referred to the **Minmetals** (supra) judgment and held as follows:

"**43.** Furthermore, in this case Ghanshyamdas Gupta expressly relinquished his right by filing an application stating that he would withdraw his objection. Such relinquishment in a given case can also be inferred from the conduct of the party. The defence which was otherwise available to Ghanshyamdas Gupta would not be available to others who took part in the proceedings. They cannot take benefit of the plea taken by Ghanshyamdas Gupta. Each party complaining violation of natural justice will have to prove the misconduct of the Arbitration Tribunal in denial of justice to them. 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. (See *Minmetals Germany GmbH* v. *Ferco Steel Ltd.* [(1999) 1 All ER (Comm) 315]) This Court's decision in *Renusagar Power Co. Ltd.* v. *General Electric Co.* [1994 Supp (1) SCC 644 : AIR 1994 SC 860] is also a pointer to the said proposition of law." (emphasis supplied)

21. In **Hari Om Maheshwari v. Vinitkumar Parikh** (2005) 1 SCC 379, this Court recorded the arguments of learned counsel appearing on behalf of the appellant on the natural justice aspect of the case as follows:

> "**7.** Shri Jaideep Gupta, learned Senior Counsel appearing for the appellant herein contended that the grounds on which the High Court has set aside the award are not the grounds contemplated under Section 30 of the Act. He submitted that arbitration proceedings having started in the year 1995 could not be completed even in the year 1999, therefore, the High Court ought not to have interfered with the award. He pointed out that in Reference Case No. 313 of 1995 pertaining to Deepa Jain the evidence had already concluded and the explanation given by the respondent for not leading evidence on 10-5-1999 was frivolous and the arbitrators rightly did not entertain a prayer for granting a further opportunity for leading evidence. Such a denial of a further opportunity by the arbitrators would not be a ground contemplated under Section 30 of the Act to set aside the award. Hence, the courts below have gone beyond the scope of Section 30 of the Act while allowing petitions to set aside the arbitration awards."

The learned Single Judge's finding in the aforesaid case, which was accepted by the Division Bench judgment on the facts of the case, is set out in paragraph 12 of the said judgment as follows:

> "**12.** It is the above award that was challenged under Section 30 of the Arbitration Act, 1940 before the learned Single Judge by the respondent which came to be allowed by the learned Single Judge. While doing so learned Single Judge observed:
>
> "the cross-examination of M/s D. Jain and Co. was over in 1997, the cross-examination of witness examined in Shri Maheshwari's reference was completed on 8-4-1999 and the arbitrators adjourned the matter to 10-5-1999 and 11-5-1999 for the petitioner to lead his

> evidence. However, it appears that the petitioner noted a wrong date and therefore, he did not appear on 10-5-1999. It is clear from the record that there is an application submitted by the petitioner before the arbitrators on 20-5-1999 regarding the mistake committed by him in recording the date of hearing and requested the arbitrators to give an opportunity to lead the evidence. One can understand if the arbitrators have after closing the matter for award delivered the award immediately but since the arbitrators had not delivered their award by 20-5-1999, they also did not deliver their award immediately thereafter, but waited till November 1999 to make their award, the arbitrators could have easily permitted the petitioner to lead evidence. I do not think that the arbitrators were justified in denying the petitioner an opportunity to lead evidence…."
>
> This finding of the learned Single Judge has been accepted by the Division Bench without any further discussion."

This Court then set aside the Single Judge's judgment in language that is even more appropriate today, given the object of the Arbitration Act, 1996, as follows:

> "**16.** From the above it is seen that the jurisdiction of the court entertaining a petition or application for setting aside an award under Section 30 of the Act is extremely limited to the grounds mentioned therein and we do not think that grant or refusal of an adjournment by an arbitrator comes within the parameters of Section 30 of the Act. At any rate 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."

22. Shri Banerjee then referred to a number of judgments including **Cuckurova Holding A.S. v. Sonera Holding B.V. (2014) UKPC 15** of

the Privy Council. In this judgment, the **Minmetals** (supra) test was referred to with approval as follows:

> "**31.** Section 36(2)(c) is in the same terms as section 103(2)(c) of the Arbitration Act 1996 in England. They reflect Article V(1)(b) of the New York Convention. In Minmetals Germany GmbH v Ferco Steel Ltd [1999] CLC 647, 658 Colman J said that the subsection contemplates that the enforcee has been prevented from presenting his case by matters outside his control, which will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. In Kanoria v Guinness [2006] EWCA Civ 222 Lord Phillips CJ held in the Court of Appeal that, on the ordinary meaning of section 103(2)(c), a party to an arbitration is unable to present his case if he is never informed of the case he is called upon to meet. He referred to the statements in Minmetals referred to above with approval.
>
> xxx xxx xxx
>
> **34.** The general approach to enforcement of an award should be pro-enforcement. See eg *Parsons & Whittemore Overseas Co Inc v Société Générale* 508 F 2d 969 (1974) at 973:
>
> "The 1958 Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral awards … [it] clearly shifted the burden of proof to the party defending against enforcement and limited his defences to seven set forth in Article V."
>
> In *IPCO (Nigeria) v Nigerian National Petroleum* [2005] 2 Lloyd's Rep 326, Gross J said at para 11, when considering the equivalent provision of the English Arbitration Act 1996:
>
> "… there can be no realistic doubt that section 103 of the Act embodies a pre-disposition to favour enforcement of New York Convention awards, reflecting the underlying purpose of the New York Convention itself …"

> The Board agrees. There must therefore be good reasons for refusing to enforce a New York Convention award. The Board can see no basis upon which it should refuse to enforce the award here if Cukurova fails to show that it was unable to present its case for reasons beyond its control."

The Privy Council, on facts, then dealt with the natural justice ground by rejecting it as follows:

> "**53.** The approach of the Tribunal described above and the reasoning in the First Partial Award shows that it gave Cukurova every opportunity to develop its case. The basis upon which the Tribunal reached its conclusions is clear. As stated above, the Tribunal indicated that it assumed Mr Berkmen's evidence to be true. It is therefore difficult to see on what grounds Cukurova can properly complain. It is not suggested that the Tribunal deliberately ignored Mr Berkmen's evidence. Although Cukurova submits that the outcome of the arbitration would have been different if Mr Berkmen had had an opportunity to be heard, it does not identify on what basis. It is of course no part of the role of the enforcing court to consider whether the decision was correct either in law or on the facts."

23. In **Eastern European Engineering v. Vijay Consulting** (2019) 1 LLR 1 (QBD), the Queen's Bench Division dealt with the "inability to present case" challenge by following **Cukorova Holdings** (supra) and **Minmetals** (supra), and then concluding:

> "**89.** It was also common ground that, as indicated as a "given" by Lord Clarke in *Cukorova* at [53], the 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."

Applying the test of “matters outside one’s control”, it was found that VCL’s challenge on this ground was not outside its control as follows:

> “**98.** In this specific context what VCL did not do (and perfectly well could have done) was to raise with the arbitrator the question of whether the form of his order in fact shut them out from putting in a statement from Dr du Toit Malan, or to make submissions as to why they needed to get evidence from some other identified person in order to respond to the submissions made. Instead they chose to seek to challenge the decision on the basis that they should be allowed to put in new evidence which covered all issues, not simply in response to Large 3. This decision to challenge on one basis and not the other is a matter which was entirely within VCL's control.
>
> **99.** In those circumstances too I accept the submission that the admission of Large 3 (or failure to allow responsive evidence) would not have had an impact on the result of the arbitration. The liability decision was based on the earlier reports of Mr Large and other witnesses. That is common ground. In relation to quantum, the arbitrator's reliance upon Large 3 had the effect of reducing the quantum awarded to EEEL (by some €9 million). It therefore cannot be said that VCL was prejudiced by Large 3. If it was prejudiced it was by its failure to avail itself of the opportunity given it to respond.” (emphasis supplied)

24. **Jorf Lasfar** (supra), referred to in paragraph 61 of **Vijay Karia** (supra), is also instructive. This case deals with a specific plea relating to natural justice in relation to a Tribunal’s procedural orders as follows:

> “**7.** We disagree. AMCI was given a full and fair opportunity to present its case. However, AMCI failed to meet its obligations under the Tribunal's procedural orders, 3 and suffered the consequences. It failed to submit any witness statements by the deadline set forth by the Tribunal. Rather, AMCI attempted to name Mr.

> Thrasher as a witness after the deadline, and without submitting a witness statement. AMCI submitted no documentary evidence save a governmental report indicating that coal was in short supply around the time of the alleged breach.
>
> xxx xxx xxx
>
> **9.** The requirements of Procedural Order No. 4 are clear, reasonable, and common in international arbitration practice. There is no dispute that AMCI understood what the Order required at the time. 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. Under the circumstances, we find that AMCI has failed to satisfy its burden to prove that the arbitral process violated our basic notions of fundamental fairness and justice. As such, AMCI cannot avail itself of either the Article V(1)(b) defense or the Article V(2)(b) defense." (emphasis supplied)

25. Shri Banerjee then referred to two United States District Court judgments. In **Consorcio Rive v. Briggs of Cancun** 134 F. Supp 2d 789, the US District Court, E.D. Louisiana, found that Briggs of Cancun, the respondent before it, refused to participate in the arbitration due to alleged criminal proceedings in Cancun. At the trial, David Briggs (representative of the respondent therein) testified that he did not seek alternative ways to appear at the hearings such as by way of telephone, nor did he send a representative of the company to appear on behalf of the company. In this fact situation, Article V(1)(b) of the New York Convention was referred to, the court finding:

> "**26.** Because Briggs of Cancun was continuously informed of all hearing dates and was provided

sufficient opportunity to present witnesses and evidence in defense of the action, Briggs of Cancun was given proper notice of the arbitration proceedings.

27. The due process guarantee incorporated in article V(1) (b) of the Convention requires that "an arbitrator must provide a fundamentally fair hearing." *Generica Ltd.,* 125 F.3d at 1130. "A fundamentally fair hearing is one that `meets "the minimal requirements of fairness" adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.'" *Id.* "[P]arties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena." *Id.* Essentially, in exchange for the convenience and other benefits obtained through arbitration, parties lose "the right to seek redress from the court for all but the most exceptional errors at arbitration." *Dean v. Sullivan,* 118 F.3d 1170, 1173 (7th Cir.1997).

28. Consistent with the federal policy of encouraging arbitration and enforcing arbitration awards, the defense that a party was "unable to present its case" raised pursuant to article V(1) (b) of the Convention is narrowly construed. *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier,* 508 F.2d 969, 975 (2d Cir.1974).

29. In the instant case, the Court finds that Briggs of Cancun was not "unable to present its case," because Briggs of Cancun could have participated by means other than David Briggs's physical presence at the arbitration. For instance, Briggs of Cancun could have sent a company representative to attend; could have sent its attorney to attend; or David Briggs could have attended by telephone.

30. Moreover, the evidence indicates that Briggs of Cancun did participate to the extent that it designated an arbitrator and filed over 80 pages of legal argument and documentation in support of its position. Because Briggs of Cancun has brought forward no additional information or evidence that it would have presented at the arbitration if it had the opportunity to do so, the Court

finds that Briggs of Cancun did have an opportunity to meaningfully participate in the arbitration.

xxx xxx xxx

33. For the foregoing reasons, the Court finds that Briggs of Cancun's defense under article V(1) (b) of the Convention must fail. The Court also specifically finds that even if there was a valid arrest warrant pending against David Briggs for some period of time, Briggs of Cancun is not entitled to a defense under article V(1) (b) of the Convention because Briggs of Cancun could have participated through its Mexican attorney or corporate representative or by telephone. Further, Briggs of Cancun has not demonstrated that it was prejudiced in any way by whatever restrictions the alleged criminal action might have imposed, because it has not pointed to exonerating evidence that it would have presented, but could not, but for the filing of the criminal Statement of Facts."

26. In **Four Seasons Hotels v. Consorcio Barr S.A.** 613 Supp 2d 1362 (S.D. Fla. 2009), the U.S District Court, S.D. Florida, dealt with the respondent, having discontinued its participation in the arbitral proceedings just prior to the final evidential hearings, as follows:

> "Moreover, regardless of the decision ultimately reached by the Court of Appeals concerning the waiver issue in the previous action to confirm the Partial Arbitration Award, the issue of the Arbitral Tribunal's jurisdiction and the propriety of the anti-suit injunction was to be conclusively decided one way or the other in the action to confirm the Partial Arbitration Award. With the jurisdictional and anti-suit injunction issues thus decided, Consorcio's withdrawal from the final evidentiary hearing, the proceeding governing the issuance of the Final Award, in an attempt to preserve its right to contest jurisdiction, was futile. Consorcio's withdrawal was thus ineffective to preserve its right to contest jurisdiction or the anti-suit injunction in the

> appeal of the Partial Arbitration Award or in this action to confirm the Final Award.
>
> Given that Consorcio's withdrawal from the arbitration proceeding was unnecessary to preserve its rights Consorcio was not precluded from or unable to present its case. Even if Consorcio's decision to withdraw from the proceeding was taken based on a good faith subjective belief that such action was necessary to preserve its rights on appeal, such a misgiving did not render Consorcio unable to present its case within the meaning of Article V(1)(b). Therefore, Consorcio has not met its burden of proving that Article V(1)(b) applies as a defense."

27. Shri Banerji then referred to a judgment of the Supreme Court of Hong Kong, reported in **Nanjing Cereals v. Luckmate Commodities** XXI Y.B. Com. Arb. 542 (1996). In paragraph 5 of the judgment the court held:

> "**5.** However, it appeared that the Defendants had had ample opportunity to present their own evidence as to quantum to the Tribunal, but by their own admission they had failed to do so. In addition, regarding the issue of whether I should exercise my discretion in refusing in any case to set aside the Award, Mr. Chan conceded that the fact that the final Award was lower than that claimed by the Plaintiffs was against his clients.
>
> xxx xxx xxx
>
> **7.**…At all events, the Defendants maintain that they did not submit their own figures to the Tribunal, though this was clearly going to be an issue before the Tribunal, nor, it appears, did they avail themselves of the opportunity to submit them later. That decision was up to them. They must now live with its consequences.
>
> **8.** Their omission was similar to that of the Defendants in another case, namely *Qinghuangdao Tongda Enterprise Development Co. v. Million Basic Co. Lt*d. [1993] 1 HKLR 173, where I held:-

"It is not accepted that the defendant had no opportunity to present its case. On the contrary, the defendant made full use of the ample opportunity given and only complained after the proceedings had finally been closed, having foregone the opportunity of asking for an extension of those proceedings. All proceedings must have a finite end."

9. In conclusion, I am not satisfied that the Defendants have made out sufficient grounds for me to refuse leave to enforce the Award under S.44 of the Arbitration Ordinance. Even if they had made out sufficient grounds, in my opinion this is a classic case where a court should exercise its discretion to refuse to set aside an award, due to the failure of the Defendants to prosecute their own case properly by submitting their own evidence to the Tribunal. The fact that the award was lower than that sought by the Claimants is also a powerful factor against exercising discretion not to enforce." (emphasis supplied)

28. Shri Banerjee then referred to a judgment to the Supreme Court of Italy reported in **De Maio Giuseppe v. Interskins** Y.B. Comm. Arb. XXVII (2002) 492. The Italian Supreme Court, in considering the ground contained in Article V(1)(b) of the New York Convention held as follows:

"[5] "The first two grounds for appeal, which must be examined together since they concern the same issues, are unfounded. Art. V(1)(b) of the New York Convention provides that the failure to communicate either the arbitrator's appointment or the arbitral proceedings, which makes it impossible to present one's case, is a ground for refusing enforcement of the award. De Maio maintains that it was unable to present its case because it was given only fourteen days to appoint an arbitrator.

[6] "This Court deems that there was no violation of due process as alleged by De Maio, and that one or more missing pages on this issue in the Court of Appeal's decision do not make this decision invalid. Since this is

> a procedural defect, we can settle the issue directly, independent of whether the lower decision failed to give reasons on this issue, the more so as we deal here exclusively with the interpretation and the application of a procedural provision.
>
> [7] "Art. V(1) provides that the party against whom the award is invoked has the burden to prove the ground for refusal of enforcement under letter (b), as well as the other grounds in that paragraph. Further, we must consider that, according to the spirit of the Convention, the recognition of arbitral awards depends on specific requirements which must be interpreted narrowly.
>
> [8] "Since in the present case it is undisputed that Interskins informed De Maio that it had appointed an arbitrator, the reasons given in the lower decision, which deems that this information and the time limit [given to De Maio] guaranteed due process, suffice, independent of a failure to give reasons on the objections raised by De Maio.
>
> [9] "Second, we must consider that the ground for refusal under letter (b) concerns the impossibility rather than the difficulty to present one's case. De Maio does not argue and certainly does not prove that it could not present its case when the arbitration was commenced or while it was held."

29. We now come to the facts of the present case. Shri Raval's plea that this Court cannot go into the question posed before it as there was no difference of opinion on HCL being unable to present its case, Justice Chatterjee J's being the only judgment on this score, has no legs to stand. The reference order that is extracted by us in paragraph 7 above, and that is contained in paragraph 1 of the decision in **Centrotrade [2017]** (supra), makes it clear that, "in view of difference of opinion, the matter is referred to a larger bench for reconsideration". That the

expression the matter was understood as meaning the entire matter and not merely issue 1, is further made clear by paragraph 5 of the said judgment as follows:

> **"**For the present, we propose to address only the first question and depending upon the answer, the appeals would be set down for hearing on the remaining issue. 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."

Finally, the 3 Judge Bench concluded:

> **48.** In view of the above, the first question before us is answered in the affirmative. The appeals should be listed again for consideration of the second question which relates to the enforcement of the appellate award."

In this view of the matter, we have proceeded to examine the correctness of Chatterjee J's views.

30. Shri Raval has argued that the London arbitrator ought to have determined the question of jurisdiction as a preliminary question, as he himself had initially indicated, before going into the substantive issues relating to the contract. We are afraid that this is an argument that has never been raised earlier, and has been raised by Shri Raval here for the first time. Even otherwise, and even if we were to go by the documents that were submitted to us for the first time by Shri Raval, the fax sent on 20.12.2000 by the arbitrator to the parties is incomplete. Even otherwise, it speaks of issues of jurisdiction and Indian law having

to be addressed as a primary question before matters of substance relating to the dispute on the contract. None of this clearly and unequivocally shows that the learned arbitrator sought to take up the plea as to jurisdiction as a preliminary objection which should be decided before other matters. This plea of Shri Raval, being taken here for the first time and for the reasons given by us, is devoid of substance.

31. Shri Raval then argued that HCL was unable to present its case as the learned arbitrator did not heed the stay order of the Rajasthan High Court dated 27.04.2000. 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 to the proceeding. Secondly, the learned arbitrator initially began the proceedings, after the green signal given to him by the ICC Court to proceed with the arbitration, by directing that the appellant serve submissions along with supporting evidence, followed by the respondent's response and evidence on 19.01.2001. This, however, was reiterated only on 03.05.2001, by which time the Supreme Court had vacated the *ad-interim ex parte* order on 08.02.2001. This plea taken by Shri Raval, also taken before us for the first time, has no legs to stand on.

32. Shri Raval then strenuously argued that considering that the last extension expired on 12.09.2001, the learned arbitrator ought to have

taken onboard two other bundles of documents and granted time for the same, given the terrorist attack in New York on 11.09.2001.

33. The sequence of events, even from the documents presented by Shri Raval for the first time, is that legal submissions were furnished after 11.09.2001 and received by the arbitrator's office on 13.09.2001. The arbitrator then stated that these submissions have been fully taken into account in the award and that by 18.09.2001, there would be no scope for any further material being supplied, as the publication of the award will follow shortly. This was communicated by fax on 18.09.2001 by the learned arbitrator to Fox & Mandal, the Attorneys of HCL. It is only thereafter, on 19.09.2001, that a couriered letter is sent to the learned arbitrator stating that Fox & Mandal would be deeply obliged if documents contained in paper binder no.1 would also be taken into account. It was then added that paper binder no.2, containing judgments of the Courts of law and authorities are being sent separately and it may take 7 to 10 days' more time beyond 19.09.2001.

34. At this stage, it is important to point out that the learned arbitrator had given a large number of opportunities to file documents and legal submissions. On 03.05.2001 the learned arbitrator directed that the appellant serve submissions along with supporting documents, following the respondent's response and evidence therein, with a right in the appellant to put in a reply, in accordance with a clear time table

that was set out. On 30.07.2001, since no defence submissions or supporting evidence was served by the respondent within the time prescribed, the time was extended, giving the respondent one last opportunity to put in their defence and to seek extension of time for so doing. Until August 2001, it may be stated that respondent did not participate in the arbitral proceedings, even though invited to do so. It is only on 09.08.2001, when the learned arbitrator informed the parties that he is proceeding with the award, that on 11.08.2001, the learned arbitrator received a fax from Fox & Mandal, Attorneys for HCL, requesting for an extension of one month's time to put in their defence. This was acceded to by the learned arbitrator on 16.08.2001, giving time upto 31.08.2001. However, on 27.08.2001, Fox & Mandal sought for a further three weeks' extension of time, which was also granted by the learned arbitrator, allowing a final extension of time until 12.09.2001. Despite the fact that the legal submissions running into 75 pages were submitted beyond time, that is only on 13.9.2001, in view of the 11.09.2001 attack in New York, the learned arbitrator received the same and took the same into account despite being beyond time. It was only on 29.09.2001 that the learned arbitrator then passed his award. Given the aforesaid timeline, it is clear that the learned arbitrator was extremely fair to the respondent. Having noticed that the respondent wanted to stall the arbitral proceedings by approaching the Courts in

Rajasthan and having succeeded partially, at least till February 2001, the conduct of the respondent leaves much to be called for. Despite being informed time and again to appear before the Tribunal and submit their response and evidence in support thereof, it is only after the arbitrator indicated that he was going to pass an award that the respondent's attorneys woke up and started asking for time to present their response. This too was granted by the learned arbitrator, by not only granting extension of time, but by extending this time even further. Finally, when the legal submissions of 75 pages were sent even beyond the time that was granted, the learned Arbitrator took this into account and then passed his award. This being the case, on facts we can find no fault whatsoever with the conduct of the arbitral proceedings.

35. Justice Chatterjee, however, in his judgment, made several errors of fact. First and foremost, in paragraph 166 of **Centrotrade [2006]** (supra), the learned Judge quoted the penultimate line in paragraph 8 of the award, without even adverting to the line just before the aforesaid line which indicated that the material that was received from HCL was in fact taken into consideration while making the award, even beyond the stipulated time of 12.09.2001. Secondly, in paragraph 167, Chatterjee,J. conjectured that between 13th and 29th September, 2001, the Arbitrator did receive further material from HCL which he did not consider while making the award, on the ground that they were received

after the time limit granted by him to HCL. Factually, there is no supporting material to show that any such further material was received by the learned arbitrator, except documents that have been presented by Shri Raval for the first time before us. They were clearly not before Chatterjee,J. when this surmise was made by the learned Judge, Further, the arbitrator cannot be faulted on this ground as, given the authorities referred to by us hereinabove, the arbitrator is in control of the arbitral proceedings and procedural orders which give time limits must be strictly adhered to. In paragraph 168, the learned Judge then said 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. This approach of a Court enforcing a foreign award flies in the face of the judgments referred to by us hereinabove. Even otherwise, Chatterjee, J., refers to the judgment in **Hari Om Maheshwari** (supra) as well as **Minmetals** (supra), but then does not proceed to apply the ratio of the said 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, the **Minmetals** (supra) test was not even adverted to by Chatterjee,J., 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 learned arbitrator. HCL chose not to appear before the arbitrator, and thereafter chose to submit documents and legal submissions outside the timelines granted by the arbitrator.

36. Even otherwise, remanding the matter to the ICC arbitrator to pass a fresh award in paragraph 169, is clearly outside the jurisdiction of an enforcing court under Section 48 of the 1996 Act.

37. For all these reasons, it is clear that Chatterjee, J.'s judgment cannot be sustained. As a result, Centrotrade's appeal, being Civil Appeal No. 2562 of 2006, is allowed. The judgment of Chatterjee,J is set aside. HCL's appeal, being Civil Appeal No. 2564 of 2006, is dismissed. Resultantly, the foreign award, dated 29.09.2001, shall now be enforced.

……J.
(R.F. Nariman)

……J.
(S. Ravindra Bhat)

……J.
(V. RAMASUBRAMANIAN)

New Delhi;
June 02, 2020.