CASE NO.:
Appeal (civil) 2562 of 2006

PETITIONER:
CENTROTRADE MINERALS & METAL INC.

RESPONDENT:
HINDUSTAN COPPER LTD.

DATE OF JUDGMENT: 09/05/2006

BENCH:
S.B. SINHA & TARUN CHATTERJEE

JUDGMENT:
JUDGMENT

WITH

C.A. 2564 of 2005

TARUN CHATTERJEE, J.

I have had an opportunity to go through the judgment delivered/proposed by my learned brother S.B. Sinha, J. I am unable to agree with the conclusion as well as the reasons of my learned brother and in that view of the matter I would prefer to give my own reasons. In my view, the judgment and order of the Division Bench and the learned Single Judge of the Calcutt High Court should be set aside and the matter be sent back to International Chamber of Commerce arbitrator for fresh disposal of the arbitration proceedings in London in the manner indicated hereinafter.

Leave granted in both the SLPs.

These are two appeals which arise from the judgment or order of a Division Bench of the Calcutta High Court reversing a judgment or order of a learned Single Judge of the same High Court whereby and whereunder the Hindustan Copper Limited (in short HCL') was directed to make payment to Centrotrade Minerals & Metals Inc. (in short "Centrotrade").

Centrotrade is incorporated in United States of America dealing with sale and purchase of non-precious metals including copper. Whereas HCL is a Government of India undertaking and its business includes purchase of copper concentrate. They entered into an agreement on 16th of January, 1996 where centrotrade was the seller and the HCL was the purchaser of copper concentrate. Clause 14 of the agreement provides for arbitration in case any differences or disputes arise between the parties. Clause 14 of the agreement reads as under :

"14. Arbitration -

All disputes and difference whatsoever arising between the parties out of, or relating to the construction meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of arbitration of the Indian Council of Arbitration.

If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitrator in London, U.K. in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce in effect on the date hereof and the result of this second arbitration will be binding on both the parties. Judgment upon the

award may be entered in any Court of Jurisdiction."

The only other relevant clause of the agreement which is required to be taken note of is Clause 16 which runs as under :

"16. CONSTRUCTION:

The contract is to be constructed and to take effect as a contract made in accordance with the laws of India."

Disputes arose between the parties to the agreement during December 1998 and January 1999 and pursuant to clause 14 of the agreement, disputes were referred to Indian Council of Arbitration where Centrotrade was the claimant. The Indian Council of Arbitration appointed an arbitrator before whom Centrotrade claimed an award for a sum of US$ 383,442.90 (equivalent to Indian Rupees 1,36,73,573.00 calculated at the exchange rate of Rs. 35.66 as prevailing on May 10, 1997) in respect of the goods shipped on board the vessels "M.V. MARITIME MASTER" AND "M.V. LOK PRITI", and for interest pendent lite at such rate as Centrotrade was entitled to under the law and also for interest on the sum awarded until decree was pronounced in terms of the award. The arbitrator appointed by the Indian Council of Arbitration, however, made a 'NIL' award dated 15th June, 1999. Disagreeing with the award passed by the arbitrator appointed by the Indian Council of Arbitration, and relying on the second part of Clause 14 of the agreement, Centrotrade approached the International Chamber of Commerce (in short 'ICC') on 22nd February, 2000. The arbitrator appointed by the ICC passed an award on 29th of September, 2001 in favour of the Centrotrade in the following manner :

"a. HCL do pay Centrotrade the sum of $ 152,112.33, inclusive of interest to the date of this award in respect of the purchase price for the first shipment.

a. HCL do pay Centratrade the sum $ 15,815.59, inclusive of interest to the date of this Award in respect of demurrage due on the first shipment.

b. 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.

c. HCL do pay centrotrade their legal costs in this arbitration in the sum of $ 82,733 and in addition the cost of the international court of Arbitration, the arbitrator's fees and expenses totaling $ 29,000.

d. 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."

After the award was passed by the ICC arbitrator, an application was filed by HCL seeking declaration of the award passed by the ICC as void and not enforceable. At the same time, Centrotrade filed an application for enforcement of the ICC Award. These applications were transferred to the original side of the Calcutta High Court which were heard and disposed of by the Judgment and order of the learned Single Judge of that Court on 10th March 2005. The learned Single Judge held that the ICC Award was enforceable in law and therefore direction was made to HCL to make payment to Centrotrade. While making this direction, it was inter alia held by the learned Single Judge as under :

(a) The ICC award was a foreign award under Section 44 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') as it satisfied all the conditions mentioned thereunder, namely,

(i) There was commercial relationship between the parties;

(ii) The award was made in U.K. - a Convention country; and

(iii) The award was made in pursuance of a written agreement between the parties.

(b) the plea of HCL that it was not given proper opportunity to present their case before the arbitrator appointed by the ICC was liable to be rejected. In this connection, the learned Judge observed that HCL had full knowledge of the proceedings and proper opportunity to present their case was duly given to HCL and therefore the plea of HCL that proper opportunity was not given, was rejected. It was also held that some papers had in fact reached the arbitrator after the stipulated time and the arbitrator also considered the submissions of HCL before making the award.

(c) Under the Indian law it was not impermissible to have an appellate arbitration forum where the agreement provided for it, following the judgments in the cases of Heeralal Agarwalla & Co. v. Joakim Nahapiet & Co., AIR (1927) Calcutta 647; Fazalally Jivaji Raja v. Khimji Poonji & Co., AIR (1934) Bombay 476 and M.A. & Sons v. Madras Oil and Seeds Exchange Ltd., AIR (1965) Madras 392, and a decision of this Court in Garikapatti Veerava v. N. Subbiah Chaudhury, AIR (1957) SC 540.

(d) The award passed by the ICC arbitrator is the relevant 'award' under the Act.

(e) The question of the award of the Indian arbitrator becoming final and binding on the parties did not arise at all.

(f) In view of Second Part of Clause 14 of the Agreement it was only the ICC award that was binding on the parties.

(g) The ICC Award was not contrary to public policy. Accordingly the claim of the HCL that Indian award was a deemed decree of the court under Section 36 of the Act and therefore a provision for appellate forum and an award passed by it, are against public policy of India insofar as they undermine powers of Indian Courts under Sections 34, 35, and 36 of the Act, was rejected.

However, on appeal, a Division Bench of the High Court, in substance, held as under :

(a) The Second part of clause 14 of the contract allowing a second arbitration is valid. Relying on the decisions of Heeralal Agarwalla & Co. v. Joakim Nahapiet & Co., (supra) Fazalally Jivaji Raja v. Khimji Poonji & Co., (supra) and M.A. & Sons v. Madras Oil and Seeds Exchange Ltd., (supra), the Division Bench held

that an appellate arbitration forum or a second arbitration was not impermissible under the Indian Law. Therefore, the award by the arbitrator appointed by the ICC who is a second arbitrator is

valid.

(b) The ICC award was not a 'foreign award' within the meaning of Section 44 of the Act, as according to the Division Bench, mere fulfillment of conditions of section 11 of the Act did not make the award a 'foreign award'. This conclusion was arrived at by the Division Bench on the ground that the conditions under Section 44 are qualified by the expression - 'unless the context otherwise requires'. According to it, if one context otherwise requires, then an award which fulfills the conditions of section 44 becomes a domestic award. According to the Division Bench,

a contract being governed by Indian laws is one such

context. Therefore, the Division Bench concluded that since the present case where the law governing the contract was Indian law, the ICC Award though made outside India, was not a "foreign award".

(c) On the interpretation of Clause 14 of the arbitration agreement, the Division bench held that the second arbitration in London was not in the nature of an appeal against the award of the Indian Council of Arbitration. Therefore, the ICC award cannot overrule the award passed by the Indian Arbitrator and thus it was not enforceable due to the operation of the Indian award.

On the above observation and findings made by the Division bench the judgment of the learned Single Judge was set aside. Aggrieved thereby, Centrotrade has filed Special Leave Petition against the aforesaid judgment of the Division Bench of the Calcutta High Court and at the same time HCL has also filed another Special Leave Petition against the same judgment. In both the Special Leave Petitions notices were issued and they were taken up for final hearing together for decision.

We have heard Mr. Sarkar learned senior counsel appearing for Centrotrade and Mr. Debabrata Roy 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 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?

Issue No. 1 - Whether second part of Clause 14 of the agreement providing for a two tier arbitration was valid permissible in India under the Act?

So far as this issue is concerned, before I go into it, it would be appropriate to state that both the Division Bench and the learned Single Judge held that a two tier agreement was valid and permissible in India under the Act.

In my view, a two tier arbitration entered into before or after the coming into force of the Act is valid and permissible in India. A two tier arbitration was permissible and valid in India under both, the 1899 Act and the 1940 Act, is now well settled. In the case of Hiralal Agarwalla v. Jokin Nahopier & Co., AIR (1927) Calcutta 647, before coming into force of the present Act, it was held that the agreement by parties to submit to more than one arbitration on the same dispute was permissible. Applying the principles laid down in the same dispute was permissible. Applying the principles laid down in Hiralal’s case (supra), Bombay High Court in Fazalally Jivaji Raja v. Khimji Poonji & Co., AIR (1934) Bombay 476, answered the issue saying that a two tier arbitration is valid and permissible in India. While answering this question, after considering the provisions of the Indian Arbitration Act, 1899, Bombay High Court observed as follows :

> "The intention of the parties is to be sole guide for determining the mode of working out the submission and reaching a final

> decision till the law of arbitration is based upon the principles of withdrawing the disputes from the ordinary Courts and enabling the parties to substitute a domestic tribunal. Once a Tribunal reaches a final decision, as contemplated or agreed upon by the parties, the Arbitration Act as it was enforced come to the help to the parties to enforce the same decision."

This view of the Calcutta High Court and the Bombay High Court was also accepted by the Madras High Court in the case of M.A. & Sons v. Madras Oil & Seeds Exchange Ltd., AIR (1965) Madras 392. I Need not deal with the issue of validity of two-tier arbitration in respect of disputes arising before the coming into force of the Act any further.

In my view this position of law has remained the same as I do not find any prohibition or ban being introduced by the Act from entering into an agreement providing for a two-tier arbitration and that at the time of introduction of the Act, it was well known to the legislature that it was consistently held and approved by courts of India that two-tier arbitration was permissible in India.

However, it was submitted by Mr. Rai Choudhary learned senior counsel appearing for HCL that use of the word "only" in Section 34 of the Act would show the legislative intendment that the domestic award cannot be challenged in any manner except in the manner provided by Section 34 of the Act. This is not the position in the present case in view of second Part of clause 14 of the agreement. In this case the parties consciously agreed to have the domestic award followed by the foreign award. In any view of the matter, the provisions of Section 34 of the Act are not intended to curtail the powers of the contracting parties to contract in the manner they desire.

For the reasons aforesaid, I am in agreement with the conclusions of the learned Single Judge as well as the Division Bench of the Calcutta High Court that a two tier arbitration agreement, even after coming into force of the present Act, is valid and permissible in India. Before I switch over to the other issues, I may point out that a question arose before us that this two tier agreement under the instant case was opposed to public policy.

Coming to the issue of the agreement being against the public policy of India, I wish to differ with the findings of my learned brother S.B. Sinha, J. I agree that it is well settled that any contractual arrangement negating the statutory provisions is invalid as being opposed to public policy. My learned brother has held in his judgment, that the contractual arrangement entered into by the parties in this case, in particular, second part of clause 14 of the agreement would in all intent and purport make the provisions of Sections 34 and 36 of the 1996 Act nugatory. I disagree with this finding of my learned brother. After a careful consideration of the 1996 Act, I find nothing in it prohibiting the parties from entering into an agreement providing for a two tier arbitration. According to my learned brother, the part of the agreement providing for two tier arbitration is invalid under the 1996 Act and that validity of an award can only be questioned before a court under Section 34 and before no other forum chosen by the parties. In my view, however, the award that must be considered by the court, for its enforcement or on the question of validity is the final award that has been passed following the procedure agreed upon by the parties.

As already held, the reasoning adopted in the decisions, as noted herein earlier, in the cases of Heeralal Agarwalla & Co. v. Joakim Nahapiet & Co., AIR (1927) Calcutta 647, Fazalally Jivaji Raja v. Khimji Poonji & Co., AIR (1934) Bombay 476 and M.A. Sons v. Madras Oil and Seeds Exchange Ltd., AIR (1965) Madras 392, squarely apply to the present Act as well. Just as there was no express prohibition on the appellate arbitration in 1899 and 1940 Acts, so there is no express prohibition in the 1996 Act. The relevant

section of 1996 Act is Section 35 which only provides that "subject to this part of arbitral award shall be final and binding on the parties and persons claiming under them respectively." Similarly, I find that Condition No. 7 of the First Schedule of the 1940 Act provided that "the award shall be final and binding on the parties and persons claiming under them respectively". In M.A. & Son's case (supra) the Madras High Court while dealing with this aspect of the matter made the following observations :

"Naturally, these words have to be construed as subject to any right of appeal, which might be provided for either by the contract itself, or by any by-law governing the parties... No doubt, except upon grounds specified in S. 30 of the Act, an award is not liable to be set aside, and is final between the parties. But, what is the award that is final between the parties, when the procedure governing the parties itself makes provision for an initial award on arbitration, and an appeal which may be instituted by either party aggrieved?... As observed by the Supreme Court... the legal pursuit of successive remedies will make them all proceedings 'connected by an intrinsic unity' and 'to be regarded as one legal proceeding". In that sense, it is the award by the appellate Tribunal, if an appeal is preferred which becomes the final award that governs the parties...."

The reasoning given by the Madras High Court in the aforesaid decision in my view equally applies to the 1996 Act, since it is based on the meaning to be given to the term "award" in the case of successive arbitration. In view of the discussion made herein earlier, and considering the above decisions, I am, therefore, of the view that Section 35 is not a bar to appellate arbitration. In my view this section only comes into operation once the arbitration proceedings as a whole which must include appellate arbitrations, if any, have ended.

In my view allowing the appellate arbitrations is fully in consonance with the objects of the 1966 Act.

Before parting with this aspect of the matter, we may take into consideration the question whether an arbitration clause that leads to both domestic and foreign awards on the same dispute, i.e. an arbitration clause providing for two different modes of arbitration, is valid or not under the Act. In His Lordship's view even if a two tier agreement is valid under the 1996 Act, it cannot be such that one award is governed by Part I of the Act and the award in the second tier governed by Part-II of the 1996 Act, as the procedure applicable to the arbitration proceedings as well as for enforcement of the awards is different under different parts. In my view, there is nothing under the 1996 Act prohibiting the parties from entering into an agreement whereunder the first arbitration proceeding is conducted under Part I of the 1996 Act and the appeal therefrom is conducted under Part II of the 1996 Act. In fact, earlier, two separate legislations, i.e. the 1940 and 1961 Act, dealt with domestic awards and foreign awards respectively. However, the legislature keeping in mind the necessity to have similarity in administration of domestic awards as well as foreign awards, has consolidated the laws relating to domestic and foreign awards in the 1996 Act, in effect making both the types of awards enforceable under the same Act. Keeping this in mind, and also that parties' autonomy is paramount, I am of the view that it is not impermissible under the 1996 Act to have one part of the award governed by Part I and the other part by Part II. Further, an appeal is an intrinsic part of the original proceeding and it is the final award that comes out after an appeal is preferred from the first award, that is relevant for the purpose of 1996 Act. Thus it follows that nothing in the 1996 Act prohibits the parties from providing a two tier arbitration wherein one tier is dealt with under Part I and the other under Part II of the 1996 Act. Such an agreement does not violate the provisions of Sections 34 and 36 of the 1996 Act and it cannot be said to be invalid as being opposed to public policy of India. Therefore, in my view, the second part of clause 14 of the agreement and the ICC arbitration in its furtherance, are not invalid as being opposed to public policy of India.

It is well recognized as my learned brother S.B. Sinha, J. had pointed out that party autonomy is a paramount consideration of the 1996 Act subject only to such safeguards as are necessary in the public interest. Therefore, so long as an agreement between the parties to enter into an appellate arbitration does not derogate from the public interest, it is always permitted. The object of Section 35 of the Act as observed in the 176th Report of the Law Commission, is to limit the ambit of court intervention in arbitral awards and this object is not affected by allowing appellate arbitrations. In this connection, it may be noted that even in foreign jurisdiction such as U.K., the appellate arbitrations are permitted. (See Russel on Arbitration 22nd Edition page 393).

That apart, even two tier arbitrations wherein the original arbitration proceeding is domestic and thus governed by Part I of 1996 Act, and the appellate proceeding is foreign and thus governed by Part II of the Act can be permitted. The judgment of my learned brother S.B. Sinha, J. that such proceedings are opposed to the public policy of India because the Act provides different procedures in respect of domestic and foreign awards appears to be based on his views that the final award in such a case would be "an admixture of domestic and foreign award", such that "one part of arbitration agreement shall be enforceable as a domestic award but the other part would be enforeceable as a foreign award." But we must keep it in mind that the doctrine of merger equally applies in cases of appellate arbitrations, such that on the issuance of appellate award, the original award merges with it and only the appellate award is valid and capable of enforcement. This was also the intention of the parties while incorporating Part II of Clause 14 of the agreement, which clearly says that only the award that would be passed by the ICC arbitrator would be binding on the parties and the judgment upon that award maybe entered in any court of jurisdiction. Therefore, I am unable to agree that such two tier arbitration proceedings culminate into an admixture of two different types of awards, as there is eventually only one award that subsists.

For the reasons aforesaid, I, therefore, conclude that the second Part of Clause 14 of the agreement is valid and permissible in India under the Act.

Issue No. 2 : Whether the ICC Arbitrator sat in appeal against the award of the Indian arbitrator or not?

In my view, to decide Issue No. 2, it is appropriate for us to read clause 14 of the agreement in depth and to find out from the same the intention of the parties. In order to come to a proper conclusion on this issue, let us again reproduce Clause 14 of the arbitration agreement.

"14. Arbitration -

All disputes and differences whatsoever arising between the parties out of, or relating to the construction meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in Accordance with the Rules of arbitration of the Indian Council of Arbitration. If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitrator in London, U.K. in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce in effect on the date hereof and the result of this Second arbitration will be binding on both the parties. Judgment upon the award maybe entered in any Court of Jurisdiction."

It appears that the first part of the arbitration agreement deals with arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. This part of clause 14 of the arbitration agreement does not say that the results of the arbitration will be binding on both the parties. Nor it says that the judgment upon the award of the first

arbitration may be entered in any court of jurisdiction. On the other hand, the second Part of Clause 14 of the agreement, as quoted above, clearly states that if a party is in disagreement with the arbitration result in India then the aggrieved party would have a right to appeal to a second arbitration in London, U.K. The word 'appeal', in my view, in this part of Clause 14 of the agreement has significance. If the phrase 'in disagreement with the arbitration result in India' and the word 'appeal' are read together, we may come to inevitable conclusion that the ICC arbitrator would act as an appellate arbitrator based in London, U.K. Moreover, if the second arbitration is not treated as an appeal, then it would be pointless for a party dissatisfied with a 'NIL' Award in India to refer the matter for a second arbitration in London, U.K. as the 'NIL' Award would always prevail over the ICC Award. Accordingly, this would defeat the object of the provision in the second part of clause 14 which clearly states that 'the results of this second arbitration will be binding on both the parties'.

That apart it is now well established that original and appellate proceedings are not distinct legal proceedings, but only constitute stages of the same legal proceedings, which are connected by an intrinsic unity.

Further, while passing the ICC Award, the ICC arbitrator in his award dated 29th of September, 2001, had observed that the award passed by the Indian Arbitrator was wrong. For clarity of factual situation, I refer to paragraph 18 of the award of the International Arbitrator and in my view the said paragraph needs to be reproduced :

> "It is clear therefore that the dry weight, determined in accordance with clause 6 at the discharge port is the final and binding basis for payment to be made by HCL to Centrotrade. The Arbitration Award of 15th June 1999 held otherwise, but, in my view, this was obviously wrong. In that Award, the arbitrator found that clause 4, and particularly clause 4.4 of the agreement was the 'dominant clause' when that clause specifically dealt with the quality certificate to be submitted with the shipping documents which would form the basis for acceptance of the shipping documents under the letter of credit. When in the context of the contract as a whole, it is plain that this part of the terms relating to provisional payment, made on the basis of load-port quantity and quality whereas the final amount due was to be determined by certificates issued at the discharging port in relation to quantity and quality. In so far as the first stage arbitrator found that there was no express promise given by HCL to pay Centrotrade in respect of Centrotrade's claim, he appears to have ignored the clear terms of the contract. Nor can there be any question of applying any public policy of India "because copper is a valuable material for the growth of Industrial development in the developing economy of India", in order to influence the decision on this point, whether the claim is framed in contract or for unjust enrichment."

As seen from the above quoted passage, the ICC arbitrator dealt with the correctness of the first award and was not acting as a mere second arbitrator but rather as an appellate forum.

I have already held, because of the use of the word 'appeal' in the second part of the arbitration clause it can be said that the intention of the parties was that the second arbitration was in the nature of an appeal and that the second award would take precedence over the first award. It is therefore amply clear that the intention of the parties to the agreement was that if the parties are dissatisfied with the first award and if approach was made to the ICC arbitrator, in view of second Part of Clause 14 of the agreement, then the first arbitration award would not be binding on the parties nor there would be any existence of the same after the ICC award was made.

Thus, it cannot be said that the proceeding before the ICC arbitrator was an independent proceeding nor it could be said that it was merely a second arbitration in London, U.K. Therefore, I am unable to agree with the views expressed by the Division Bench of the Calcutta High Court saying that the ICC arbitration was not in the nature of appeal. Accordingly, the findings of the Division Bench of the High Court on this issue are set aside.

Issue No. 3 : Whether the ICC award is a Foreign Award or not?

The next question is whether the ICC award is a foreign award or not. The learned Single Judge held that it is a foreign award, whereas, the Division Bench of the Calcutta High Court held it not to be so and that it was fact a domestic award. Section 44 of the Act, deals with "foreign award". To appreciate whether a particular award is a foreign award or not, it would be appropriate for us to refer to section 44 which reads as under :

"44. Definition. - In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 -

(a) in pursuance of an agreement in writing for arbitration to which the convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

From a bare perusal of section 44 of the Act, it appears that in order to come to a conclusion that a particular award is a foreign award, the following conditions have to be satisfied.

(1) The legal relationship between the parties must be commercial.

(2) The award must be made in pursuance of an agreement in writing.

(3) The award must be made in a convention country.

In the present case, it cannot be disputed that the aforesaid three conditions were satisfied, that is to say, there exists a commercial relationship between the parties, the ICC award was made in pursuance of an agreement in writing between the parties and the award was made in a Convention Country (London, U.K.). In spite of all these conditions having been fully satisfied, the Division Bench of the Calcutta High Court different with the views of the learned Single Judge by holding that it was a domestic award.

Section 44 of the Act, as quoted herein above, therefore, makes an award foreign, if the above mentioned criteria are fulfilled, ‘unless the context otherwise requires’. The Division Bench, however, laid heavy stress on this phrase to say that, even though the ICC award fulfils conditions under section 44 of the Act, it cannot be considered to be a "foreign award". According to the Division Bench one of the situations to which the phrase "unless the context otherwise requires" is applicable, is when the law governing an arbitration agreement is Indian law. Thereby, saying that if the law governing the "otherwise foreign award" is Indian, the award becomes a domestic award. While coming to this decision, the Division Bench relied on the decisions of this Court in Sumitomo Heavy Industries Limited v. ONGC Ltd., [1998] 1 SCC 305 and National Thermal Power Corporation v. Singer Company, [1992] 3 SCC 551. However, the aforesaid two decisions of this Court were based on section 9(b) of the repealed Foreign Awards (Recognition and Enforcement) Act, 1961. Under the repealed Foreign Awards

(Recognition and Enforcement) Act 1961, section 9(b) expressly provided that its provisions would not be applicable to any award made on an arbitration agreement governed by the law of India. However, on repeal of this 1961 Act, by section 85 of the Act, no corresponding provision to Section 9(b) of the 1961 Act has been made. In other words, the position of law under section 9(b) of the Foreign Awards (Recognition and Enforcement) Act, 1961 was deliberately not incorporated in the present Act. Therefore, under the present Act, an award in pursuance of an arbitration agreement governed by Indian Law, if the conditions under Section 44 are satisfied, will not cease to be a foreign award, merely because the arbitration agreement is governed by the law of India. Accordingly, in my view, the aforesaid two decisions of this Court on which strong reliance was placed by the Division Bench of the Calcutta High Court can easily be distinguished. The Division Bench of the Calcutta High Court also held that section 48(1)(e) of the Act is one such provision which attracts the first part of section 44 i.e. the phrase "unless the context otherwise requires". Section 48 (1)(e) reads as under :

"48. Conditions for enforcement of foreign awards.-

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that-

(2) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

From a bare reading of this Section, it is evident that Section 48 (1)(e) deals with the grounds for refusal of the enforcement of a Foreign Award. Production of proof that such an award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made, cannot change a foreign award to a domestic award, but merely makes it a foreign award which may not be enforced. In Sumitomo Heavy Industries Limited v. ONGC Ltd., [1998] 1 SCC 305 it was however held, in substance, by this Court, where the contract is governed by Indian law and the seat of the arbitration is elsewhere, wherein arbitrability of the dispute is established, procedural law of the country of seat of arbitration governs the conduct of the arbitration proceedings till the award is delivered. Therefore, the phrase "or under the law of which that award was made" used in section 48(1)(e) refers to the law of the country in which the arbitration had its seat rather than the country whose law governs the substantive contract. It is true that the contract and the agreement clause is governed by the substantial law of India. It is an admitted position that the seat of the second arbitration was in U.K. Therefore, relying on Sumitomo Heavy Industries v. ONGC Ltd. (Supra) the relevant country was U.K. under the procedural law of which the award was made. Thus, section 48 (1)(e) does not by itself contemplate attracting first part of section 44 of the Act.

In this connection, the next question is whether the expression "unless the context otherwise requires" as used in section 44 of the Act ever comes into play. This question can be looked into by the following illustration where the expression takes relevance.

Let us consider a contract, including the arbitration agreement, governed by Indian Law and under it the seat of arbitration is mentioned as U.K. However, before the commencement of the arbitration proceeding, the parties agree that though the physical seat of arbitration is in U.K., for all purposes the seat of arbitration shall be deemed to be India and the arbitral proceedings shall be conducted under the curial law of India. In this situation, though all the conditions under section 44 were satisfied the award by the arbitrator cannot be said to be a foreign award. In such a situation, the expression "unless the context otherwise requires" in section 44 takes meaning and becomes applicable and relevant.

There is yet another aspect in this matter on the question whether the award that was passed by the ICC arbitrator was a foreign award of not. According to the Division Bench, as noted herein earlier, the award passed by the ICC arbitrator was not a foreign award. Sub-section (2) of Section 2 of the Act clearly says that Part I of the Act shall apply where the place of arbitration is in India. Sub-Section (7) of Section 2 of the Act says that an arbitral award made under Part I shall be considered as a domestic award. In view of sub-sections (2) and (7) of Section 2 of the Act read with Section 44, in respect of which I have already dealt with, there cannot be any doubt that the Division Bench was wrong in its conclusion that the award passed by the ICC arbitrator was a domestic award. As noted herein earlier, we should also keep in mind that Section 9(b) of the Foreign Awards (Recognition and Enforcement) Act, 1961 which provided that it did not apply to an arbitral award made pursuant to an arbitration agreement governed by law of India, has been clearly omitted by Section 51 of the 1996 Act. In this connection, reference may be made to a decision of this Court in Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc., [2003] SCC 79.

In this view of the matter and in view of the discussions made herein above, I am of the firm opinion that the award of the ICC arbitrator was not a domestic award but a foreign award as rightly held by the learned Single Judge of the High Court.

Issue No. 4 : Whether HCL was given proper opportunity to present its case before the ICC arbitrator ?

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

"(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."

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 8th February 2001 and direction was given for the ICC proceedings to continue in accordance with law.

It is true, in his award, Mr. Jeremy Lionel Cooke, the ICC arbitrator has noted that he was appointed by ICC on 7th June 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 20th December 2000, 19th January 2001 and 3rd May 2001. However, HCL did not comply with these orders. On 30th July 2001, he sent a fax to HCL to find out whether they intended to file their defence. He sent a further fax on 9th August 2001 informing them that he was proceeding with the Award. Then on 11th August 2001, the ICC arbitrator received a reply seeking extension of time. He granted time till 31st August 2001. He received another request from HCL’s representatives on 27th August 2001 for further extension of time. He granted extension till 12th September 2001. He received the first set of submissions filed by HCL, without supporting evidence, on 13th September 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".

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.

It must be noted that this Court vacated the stay on the proceedings on 8th February 2001. The first direction of the ICC arbitrator to the parties, after the order of this Court on 8th February 2001, to serve submissions to him was made on 3rd May 2001, i.e. after a time gap of nearly 3 months. Co-operation of HCL was next requested only on 30th July 2001, i.e. after a time gap of nearly 2 months. Then the communication on 9th August 2001 stated that the arbitrator was proceeding with the award. This time there was a response from HCL. Upon there requests, a time limit of nearly one month ending on 12th September 2001, was given to HCL. The arbitrator received first set of submissions filed by HCL on 13th September 2001. Then he made award 16 days later on 29th September 2001. It seems that between 13th and 29th September 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.

It is clear from the above lay out of facts that there have been delays in the arbitral proceedings right from the beginning when Centrotrade approached in ICC on 22nd February 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 the 8th February 2001 when the order of this Court was made to 3rd May 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 11th September 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 material received by him after 13th September 2001 and before 29th September 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 29th September 2001. Considering the decisions in Hariom Maheshwari v. Vinit Kumar 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.

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.

Accordingly, both the appeals are disposed of.

There will be no order as to costs.

ORDER

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.