OCD – 3

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION

ORIGINAL SIDE

COMMERCIAL DIVISION

IA NO. GA/5/2021

In EOS/11/2003

CENTROTRADE MINERALS & METALS INC.

Vs

HINDUSTHAN COPPER LIMITED

BEFORE:

THE HON'BLE JUSTICE SUGATO MAJUMDAR

Date: 9th April, 2024

Appearance:

Mr. S. N. Mookherjee, Sr. Adv.

Mr. S. Mookherjee, Adv.

Ms. Ashika Daga, Adv.

Mr. Vishal Gehrana, Adv.

Mr. Raunak Das Sharma, Adv.

...for the award holder

Mr. Jishnu Saha, Sr. Adv.

Mr. Ishaan Saha, Adv.

Mr. G. Singh, Adv.

...for the award debtor

The Court: GA 5 of 2021 is an application under Section 48/49 of Arbitration and Conciliation Act, 1996 filed by the award debtor Hindustan Copper Limited (henceforth referred to as 'HCL') praying for order refusing to enforce Clause 27(5) of the Award dated 29th September, 2001 along with other prayers against the award

holder M/s Centrotrade Minerals and Metals incorporation (henceforth referred to as "Centrotrade").

Gist of the case is that HCL and Centrotrade entered into an agreement on 16.01.1996 for purchase of 15,500+- 5% (Dry Metric Tonnes) of copper concentrate. The supply was to be made under two consignments. The first consignment was to be delivered by January/February 1996 of 7,500+- 5% (Dry Metric Tonnes) and the second consignment of 7,500+- 5% (Dry Metric Tonnes) was to be delivered in the month of February/March 1996. Delivery was to be made at Port Kandla and the goods should reach ultimately to Khetri Nagar Plant of HCL located in District of Jhunjhunu, Rajasthan. The written contract contains detailed terms and conditions including arbitration clause. According to Centrotrade a sum of $328,112.80 being the alleged balance of the purchase price and demurrage payable under the contract arising out of the two shipments of copper concentrate shipped to Kandla Port, India. Centrotrade approached Indian Council of arbitration for settlement of the disputes. An arbitrator was appointed. This Arbitral Tribunal rejected the claim of Centrotrade. Thereafter, Centrotrade invoked the second-tier of arbitration by approaching the international chamber of commerce. The Arbitrator, Mr. Jeremy Lionel Cooke, QC, so appointed by International Chamber of Commerce, passed the Award on 29th September, 2001 in favour of Centrotrade.

Centrotrade filed Execution Application No. 1 of 2002 in Miscellaneous Case No. 366 of 2002 in the Court of District Judge, South 24 Paraganas at Alipore. Subsequently, the execution case was transferred to this Court and was renumbered as EOS 11 of 2003.

A Single Bench of this Court, in terms of the Order dated 10/03/2004, declared that the Award dated 29th September, 2001 is enforceable at law. Appeal was preferred before the Division Bench which, in terms of the Order dated 28/07/2004, set aside the order passed by the Single Bench holding, *inter alia*, that the said award is not enforceable although, decided that two-tier arbitration agreement is valid in law. Centrotrade, being the award holder and HCL being the award debtor filed Special Leave Petitions before the Supreme Court of India challenging the order of the Division Bench dated 28th July, 2004. Both these Special Leave Petitions were admitted and converted to civil appeals which were then heard together. Division Bench of the Supreme Court of India, by a common order dated 09/05/2006, referred the matter to a larger Bench in view of disagreement between the two Hon'ble Judges. The matter was taken up by Three Judges Bench and an order was passed on 15/12/2006 framing two issues:

A) Whether a settlement of disputes of difference 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?

B) Assuming that a two tier procedure is permissible under the law of India, whether the award rendered in the appellate arbitration, being a foreign award under the law of India 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?

Three Judges Bench of the Supreme Court of India decided the first question affirmatively in favour of Centrotrade observing that that, on a combined reading of

Section 34 (1) of 1996 Act and Section 35 thereof, an arbitral award would be final and binding on the parties unless it is set aside by a competent court on an application made by a party to the arbitral award. This does not exclude the autonomy of the parties to an arbitral award to mutually agree to a procedure whereby the arbitral award might be reconsidered by another arbitrator or panel of arbitrators by way of an appeal and the result of that appeal is accepted by the parties to be final and binding subject to a challenge provided for by the arbitration & Conciliation Act, 1996. It was further observed that recourse to a court is available to a party for challenging an award does not ipso facto prohibit the parties from mutually agreeing to a second look at an award with the intention of an early settlement of disputes and differences.

On 02/06/2020 the Three Judges Bench of the Supreme Court of India decided the second issue in favour of Centrotrade passing order that the foreign award dated 29/09/2001 be enforced. A review petition filed by HCL was subsequently dismissed.

GA 5 of 2021 is filed subsequent to the order to passing of the second judgment of the Supreme Court of India dated 02/06/2020 praying for

a) An order be made refusing to enforce clause 27 (5) of the award dated 29/09/2001 directing the award debtor to pay compound interest on the sums directed to be paid under clauses 27 (1), (2), (3) and (4) of the award @ 6% per annum with quarterly rests until the actual date of payment;

b) An order be made granting the award debtor leave to pay the said sum of Rs.55145313.68/- to the award holder in full and

final satisfaction of all its claims under the award dated 29th September, 2001; c) An order be made recording that payment of the sum of Rs.55145313.68/- by the award debtor under the award dated 29th September, 2001 will fully discharge the obligation of the award debtor under the same.

c) An order be made recording that payment of the sum of Rs.55145313.68p by the award debtor under the award dated 29th September, 2001 will fully discharge the obligation of the award debtor under the same;

d) An ad-interim order be made in terms of prayers above;

Parties exchanged their respective affidavits.

The crux of the case agitated by HCL in GA 5 of 2021 and argument made in this regard is that there was no adjudication on any question as to whether the award and particularly the portion thereof pertaining to post award interest is contrary to the public policy of India, being in contravention with the fundamental policy of the Indian law or being in conflict with the most basic notions of morality or justice.

The first limb of argument of Mr. Jishnu Saha, the Learned Senior Counsel, appearing for HCL is that the contract between the parties was entered into on 16/01/1996. Clause 11.4.2 of the contract provided for payment of interest, to say more particularly, interest at LIBOR rate plus 0.5% per annum from the bill of lading dated till the date payment is actually made. The Arbitrator, appointed by International Court of Commerce, in the Award dated 29/09/2001, accepted that the contract provided for interest on the balance of outstanding purchase price at 180

date LIBOR rate on each of the two shipments from their respective bill of lading dates. The Arbitrator held that such rate was contractually applicable and was in any event the appropriate rate to be applied to the date of the award and until actual payment. However, as Mr. Saha submitted the Arbitrator departed from the agreed rate of interest as provided in clause 11.4.2 of the contract and proceeded to direct HCL to pay compound interest on the above sums and on legal cost of arbitration from the date of the award at 6 per cent per annum with quarterly rests until the actual date of payment. This is contained in clause 27 (5) of the Award dated 29/09/2001. It is contention of Mr. Saha that this part of award is beyond the scope of the contract and is not capable of being enforced. Mr. Saha elaborated in his argument that arbitration proceeding as well as the Arbitrator is creation of contract. There is no scope, therefore, to travel beyond the scope of the contract. Referring to Section 31 (7) of the Arbitration and Conciliation Act, 1996, Mr. Saha submitted that Section 31 (7) (a) provides for pre-reference and *pendente lite* interest no arbitrator can transgress the agreement between the parties and must adhere to the agreed rate of interest. Section 31 (7) (b) provides for a default rate of interest for post award period only if no other rate is specified by the arbitrator in the award. If the arbitrator exercises discretion to specify the post award interest in the award itself, Section 31(7) (b) ceased to have any effect. It is submitted further that a comprehensive reading of Section 31 (7) yields that if the arbitrator chooses to make an award for post award interest, he must adhere to the agreed rate of interest, if any, and cannot act in derogation to the agreement.

Referring to Section 28 of the Arbitration and Conciliation Act, 1996, Mr. Saha submitted that in terms of the Section 28 (2) and 28 (3) of the Act, an arbitrator is statutorily required to decide dispute in terms of the contract; the tribunal does not

have power to ignore the provisions of the contract and to decide equitable considerations unless expressly authorized to do so by the parties. Mr. Saha referred to **MD, Army Welfare Housing Organization Vs. Sumangal Services (P) Ltd., [(2004) 9 SCC 619].** Referring to **Morgan Securities Vs. Videocon [(2023) 1 SCC 620]** it is argued that in absence of an agreement to the contrary of arbitral tribunal has discretion to grand post award interest on the sum awarded comprising of the principal together with pre-award interest or only the portion of the "sum awarded".

It is submitted that such portion of the award directing payment of post award interest at a rate *de hors* the agreement between the parties suffers from inherent lack of jurisdiction and can be severed from the rest of the award which does not suffer from any such infirmity. When any part of the award is passed in violation of Section 28 (3) and in derogation of the agreement between the parties there remains inherent lack of jurisdiction.

Next point of argument is that under Section 48 (1) of the Arbitration and Conciliation Act, 1996 enforcement of a foreign award may be refused at the request of the party against whom it is invoked on certain contingencies as enumerated in the following sub-paragraphs. But enforcement of an arbitral tribunal award may also be refused if the Court fines that, among others, the enforcement of the award is contrary to the public policy of India. Mr. Saha refers to explanation (ii), namely, "contravention with the fundamental policy of Indian law". Referring to decision of the Delhi High Court in **Devas Employees Mauritius Pvt. Ltd. Vs. Antrix Corporation Ltd. and others [(2023) SCC OnLine Del 1608]**, Mr. Saha argued that the Court has the power to *suo motu* discover whether the award is in conflict with public policy of India and to set aside the award on such ground. Mr.

Saha further referred to **Vijay Karia & Ors. Vs. Prysmian Cavi E Sistemi SRL [(2020) SCC OnLine SC 117]** in support of his argument.

Next it is argued by Mr. Saha that even though the Hon'ble Supreme Court of India has already been decided that the award is to be executable and although Centrotrade has raised a plea of *res judicata* yet, in view of the language of Section 48 (2) of the Act of 1996. There can be no fetter on *suo motu* power of a court to discover whether the award in question is in conflict with public policy of India. A further argument is advanced by Mr. Saha that even though the respondent has raised a plea that award of compound interest is not contrary to public policy of Indian law in view of ratio of **Renusagar Power Co. Ltd. Vs. General Electric Co., [(1994) Supp. (1) SCC 644]** the principal is not applicable in the factual matrix of the case. Renusagar's case was decided in the context that an award for interest on interest, that is compound interest, will not be contrary to public policy where there is an expressed or implied provision in the contract to justify imposition of such interest.

Mr. Saha refuted the contention of Centrotrade that Section 31 of the Arbitration and Conciliation Act, 1996 does not apply to the instant case as Section 31 is contained in Part I and not Part II of the Act 1996. According to him, Section 28 (3) applied both two domestic and international arbitrations; HCL has challenged the enforceability of an impugned portion of the foreign award. According to him, if the respondent's argument is accepted, that Section 31 being in Part I of the Arbitration and Conciliation Act, 1996 does not apply to the instant case dealing with the enforceability of a foreign award, then such impugned portion of the award cannot be sustained by claiming that discretion was available to the arbitrator to

detract from the Clause 11.4.2 of the contract providing for interest at LIBOR rate plus 0.5% both upto the date of the award and until the actual payment.

Per contra, Mr. Mukherjee, the Learned Senior Counsel, appearing for the Centrotrade argued first that in terms of the Order dated 2nd June, 2020, Three Judges Bench of the Supreme Court of India finally decided the enforceability of the award in the language "foreign award, dated 29.09.2001 shall now be enforced." The review petition filed by HCL was dismissed by the Supreme Court of India in terms of order dated 01/09/2020. In the context of the Order of the Supreme Court of India dated 2nd June, 2020 and subsequent dismissal of review petition, enforceability of foreign award dated 29/09/2001 reached its finality and it is incumbent upon this Court to execute the decree in compliance with the said Order of the Supreme Court of India. It is argued by Mr. Mukherjee that the challenged to present paragraph 27(5) of the arbitral tribunal award cannot be made at this juncture as the same is hopelessly barred by the principal of constructive *res judicata*, according to him. The plea of HCL as to allege impermissibility of awarding interest was also taken by it in the Affidavit-in-Opposition dated 06/12/2003 resisting execution of the award but no order was passed in respect of that. Therefore, HCL cannot be allowed to raise the same plea again having failed to secure any relief in the earlier stages of litigation.

Secondly, it is argued that the instant arbitral award dated 29/09/2001 is a foreign award within the meaning of Section 44 of the 1996 Act. Therefore, Part II of 1996 Act shall be applicable. Section 28 and 31 of the Arbitration and Conciliation Act, 1996 are provisions under Part I of the 1996 Act. These provisions only applied where the place of arbitration is in India. Sections 28 and 31 of the Arbitration and Conciliation Act, 1996 are also not saved under the Provisions of Section 2 (2) of the

Act. Even assuming that Sections 28 and 31 are applicable, paragraph 27 (5) of the arbitral award is not against the fundamental policy of Indian law, according to him. It is further submitted that in passing the award the arbitrator duly considered Clause 11.4.2 of the contract without travelling beyond the terms of contract. In continuation, a further argument is made that Section 31 (7) (a) of the 1996 Act only governs interest for the period between date on which the cause of action arose and the date on which the award is made i.e. pre-reference and *pendente lite* interest. The section provides that an arbitral tribunal may award interest at a reasonable rate for these periods unless the parties agreed otherwise. In the instance case, the Learned arbitrator had applied contractual rate of interest as will be evident from the award itself. Thus, according to the Learned Counsel Section 31 (7) (a) of the 1996 Act is not offended. It is further contended that Section 31 (7) (b) of the Act provides that a "sum" directed to be paid by an award shall carry interest at a rate 2% higher than the current rate of interest and for the post award period i.e. from the date of award to the date of payment. However, this is subject to the fact that an arbitrator may direct interest at any other rate in the award. Referring to the decisions of the Supreme Court of India in **Hyder Consulting (UK) Ltd. Vs. Governor State of Orissa [(2015) 2 SCC 189]** as well as **Hyder Consulting (UK) Ltd. Vs. State of Orissa [(2016) 6 SCC 362],** the Learned Counsel submitted that in the aforesaid two cases it was held that the word "sum" used in Section 31 (7) (b) corresponds to the amount awarded under Section 31 (7) (a) of the 1996 Act whether with or without interest. In other words, the interest awarded for post award period could also be on a sum of money which was awarded as interest for pre-award period. According to Mr. Mukherjee, these decisions clearly established that and arbitrator has jurisdiction to allow interest on the arbitral sum inclusive of pre-award interest i.e. compound interest. Referring to **Renusagar Power Company Ltd.**

Vs. General Electric Company [(1994) Supp. (1) SCC 644] it is argued that there is no absolute bar on awarding interest on interest under the Indian law. The Learned arbitrator was well within his jurisdiction took award compound interest in paragraph 27 (5) of the arbitral award and the said award does not violate Section 31(7) (b) of the Act of 1996.

I have heard rival submissions.

Part of the awarded amount has already been paid since prayer (b) was allowed earlier. Objection of HCL is payment in terms of Para. 27(5) of the Award.

The Award was passed on 29th September, 2001 by the arbitrator Jeremy Cook QC, after passing of the award Arbitration Execution Case no. 1 of 2002 was filed in the Court of District Judge, South 24 Parganas at Alipore. Centrotrade moved an application before this Court under Clause 13 of the Letters Patent 1865. By order dated 18/09/2003 the execution application was transferred to this Court and was registered as EOS 11 of 2003. On 10/03/2004 a Single Judge of this Court passed an order in the present proceeding declaring that final award made by the sole arbitrator is enforceable in law and was deemed to be decree of this Court. The HCL raised the issue that second part of the arbitration agreement was against public policy of India and arbitration through the ICC was not permissible. The Single Judge of this Court passed an order that the final award of Mr. Jeremy Cook QC enforceable in law and deemed to be decree of this Court. An appeal was preferred before the Division Bench. The Division Bench by its Judgment dated 28/07/2004 held that the London award could not be said to be a foreign award but that two-tier arbitration clause would be valid. In nutshell, the appeal was allowed and the judgment of the Single Bench of this Court was set aside. The matter went up to the

Supreme Court of India. In view of divergence of opinion, Three Judges Bench was constituted to consider two issues as aforesaid. Three Judges Bench of the Supreme Court of India decided the Issue No. 1 affirmatively in favour of Centrotrade in terms of judgment dated 15/12/2016 subsequently, in terms of order dated 2nd June, 2020 another Three Judges Bench of the Supreme Court of India considered the Issue no. 2 and also decided affirmative with observation that the foreign award dated 29/09/2001 be enforced.

Since the passing of the Award the parties are involved in multiple rounds of litigations on different issues of law one of which is enforceability of the foreign award. The question that the award is opposed to public policy was raised before the Single Bench of this High Court which was decided negative against HCL. HCL could have agitated other points of law regarding enforceability this foreign award and objections regarding Para. 27(5) of the award which are canvassed before this Court in connection with this instant application. A question of enforceability of the instant award went up to the Supreme Court of India. In the second judgment the Supreme Court of India considered the enforceability of the award. Grounds challenging the enforceability of the award, canvassed herein, could have been made and raised before the Supreme Court of India. In the second judgment dated 2nd June, 2020 the Supreme Court of India directed that the instant foreign award dated 29/09/2001 be enforced. A review application failed by HCL was dismissed also. In view of the order passed by the Supreme Court of India there is hardly any scope for this Court to rehear the enforceability issue of the Award on the ground agitated herein, which could have been raised before the Supreme Court of India. Judicial discipline does not warrant rehearing the same issue decided by the highest Court of

the country. On passing of the order that the award should enforced, issues regarding enforceability of the award reached its finality.

Therefore, for reasons aforesaid, prayer (a) cannot be allowed substance of which has already been decided by the Supreme Court of India. Prayer (b) was allowed earlier. Payment in terms of prayer (b) cannot discharge the obligation of HCL to pay in terms of the Award dated 29/09/2001. Since prayer (a) is not allowed, prayer (c) stands dismissed.

Accordingly, GA 5 of 2021 is disposed of.

The foreign award dated 29/09/2001 be executed.

The instant EOS 11 of 2003 be placed before the appropriate bench for execution.

(SUGATO MAJUMDAR, J.)