SUPREME COURT OF INDIA

Centrotrade Minerals & Metal Inc.

Vs.

Hindustan Copper Ltd.

C.A.No.2562 of 2006

(Madan B.Lokur,J., R.K.Agrawal and D.Y. Chandrachud,JJ.,)

15.12.2016

JUDGMENT

Madan B.Lokur,J.,

1. These appeals have been referred to a Bench of three judges in view of a difference of opinion between two learned judges of this Court. The controversy is best understood by referring to the proceedings recorded on 9th May, 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.18611/2004 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 Justice Sinha and Justice Chatterjee are reported as *Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.*[1]

2. Since the facts of the case have been detailed by both the learned judges in their separate judgments, it is not necessary for us to detail them for the third time. What is necessary to state, however, is that the parties had entered into a contract and some disputes and differences arose between them. The contract contained an arbitration clause and Centrotrade invoked it. Pursuant thereto the Indian Council of Arbitration appointed an arbitrator. The arbitrator gave a NIL award and then Centrotrade invoked the second part of the arbitration clause and the arbitrator in London gave an award on 29th September, 2001 in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The award rendered by the arbitrator in London was sought to be enforced by Centrotrade by moving an application under section 48 of the Arbitration and Conciliation Act, 1996.

3. The arbitration clause in the contract between the parties is Clause 14 and this reads as follows:

> "14. Arbitration - All disputes or 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 arbitration in London, UK 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 in jurisdiction."

4. Clause 16 of the contract is also important and this reads as follows:

> "16. Construction - The contract is to be constructed and to take effect as a contract made in accordance with the laws of India."

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?
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> (2) Assuming 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. Appreciating Clause 14 of the contract"

6. At the outset, it is necessary to appreciate the parties' intention when they agreed upon the arbitration clause in the contract. A plain reading of the arbitration clause suggests that the contracting parties intended: (a) Firstly, a settlement of their disputes or differences by arbitration in India through an arbitration panel of the Indian Council of Arbitration and in accordance with the Rules of Arbitration of the Indian Council of Arbitration, and (b) Secondly, if either of the contracting parties was in disagreement with the 'arbitration result' in India, then the aggrieved party would have a right to appeal to a second arbitration in London in accordance with the Rules of Conciliation and Arbitration of the International

Chamber of Commerce. The result of the appellate arbitration would be binding on both the parties, subject to a legal challenge in accordance with law. The text of the arbitration clause is quite clear and explicit and does not admit of any doubt on its interpretation. The contracting parties intended Clause 14 of the contract to provide for two opportunities at resolving their disputes or differences. The first occasion would be a settlement by arbitration in India (the 'arbitration result') and the second occasion would be by arbitration in London, with the second occasion being in the nature of an appeal against the 'arbitration result' in India.

7. It was the contention of learned counsel for Centrotrade that the 'arbitration result' in India was not an award as conventionally understood with reference to arbitration, but merely a 'result' of arbitration given by an arbitration panel of the Indian Council of Arbitration and nothing more. We are not at all inclined to accept this interpretation. While Clause 14 of the contract may have used the expression 'arbitration result' and not the expression 'arbitration award' clearly the parties' intention was that the 'arbitration result' would be an award or at least in the nature of an award rendered by the arbitration panel of the Indian Council of Arbitration. The proceedings before the arbitration panel were intended to be structured and held in accordance with the Rules of Arbitration of the Indian Council of Arbitration. The result of such proceedings would inevitably be an arbitration award, regardless of the nomenclature used by the parties. It is difficult to interpret the words 'arbitration result' other than meaning an arbitration award.

8. We say this also because if the submission of learned counsel for Centrotrade were to be accepted, it would mean that if both the contracting parties were satisfied with the 'arbitration result' (or negatively put, if neither party was dissatisfied with the 'arbitration result') there would be no method of enforcing that 'arbitration result' should such enforcement become necessary. This would create a vacuum post the 'arbitration result'. It is to avoid such a vacuum that 'arbitration result' must be understood to mean an award of the arbitration panel of the Indian Council of Arbitration and an award that could be enforced in accordance with the laws of India, that is, the Arbitration and Conciliation Act, 1996 (for short 'the A&C Act').

9. The general principle that we have accepted is supported by two passages in Comparative International Commercial Arbitration [2] In paragraph 24-3 thereof reference is made to Article 31(1) of the United Nations Commission on International Trade Law (or UNCITRAL) Rules to suggest that while all awards are decisions of the arbitral tribunal, all decisions of the arbitral tribunal are not awards. Similarly, while a decision is generic, an award is a more specific decision that affects the rights of the parties, has important consequences and can be enforced. The distinction between an award and a decision of an arbitral.

> "(i) concludes the dispute as to the specific issue determined in the award so that it has res judicata effect between the parties; if it is a final award, it terminates the tribunal's jurisdiction;
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> (ii) disposes of parties' respective claims;

(iii) may be confirmed by recognition and enforcement;

(iv) may be challenged in the courts of the place of arbitration."

10. In ***International Arbitration***[3] a similar distinction is drawn between an award and decisions such as procedural orders and directions. It is observed that an award has finality attached to a decision on a substantive issue. Paragraph 9.08 in this context reads as follows:

> "9.08 The term 'award' should generally be reserved for decisions that finally determine the substantive issues with which they deal. This involves distinguishing between awards, which are concerned with substantive issues, and procedural orders and directions, which are concerned with the conduct of the arbitration. Procedural orders and directions help to move the arbitration forward; they deal with such matters as the exchange of written evidence, the production of documents, and the arrangements for the conduct of the hearing. They do not have the status of awards and they may perhaps be called into question after the final award has been made (for example as evidence of 'bias', or 'lack of due process')."

11. In *International Commercial Arbitration* [4]the general characteristics of an award are stated. In Paragraph 1353 it is stated as follows:

> "1353. - An arbitral award can be defined as a final decision by the arbitrators on all or part of the dispute submitted to them, whether it concerns the merits of the dispute, jurisdiction, or a procedural issue leading them to end the proceedings."
>
> This is subsequently elucidated through four aspects of an award, namely: (i) An award is made by the arbitrators; (ii) An award resolves a dispute; (iii) An award is a binding decision; and (iv) An award may be partial.

12. The arbitration result in the present case has all the elements and ingredients of an arbitration award. Taking also into consideration the view expressed by the above authors, we have no hesitation in concluding that the 'arbitration result' in the first part of Clause 14 of the contract must mean an arbitration award given by the arbitral panel of the Indian Council of Arbitration. To this extent we disagree with learned counsel for Centrotrade but agree with learned counsel for Hindustan Copper Limited (hereafter referred to as 'HCL').

13. The alternative submission of learned counsel for Centrotrade is that in any event on being dissatisfied with the arbitration result, the second part of Clause 14 of the agreement entitles the aggrieved party to appeal to a second arbitration in London in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. However, according to learned counsel for HCL the second part of Clause 14 of the contract is contrary to the laws of India.

14. In our opinion the plain language of Clause 14 specifically provides for a second arbitration, in the form of an 'appeal' against the award of the arbitration panel of the Indian Council of Arbitration. We do not think it necessary to labour on this issue, given the express words used in Clause 14. For the record, we may note that learned counsel for HCL spent considerable time on explaining that the right to file an appeal can only be created by a statute and not by an agreement between the parties. This may be so in respect of litigation initiated in courts under a statute or for the enforcement of common law rights, but that does not prevent parties from entering into an agreement providing for non-statutory appeals so that their disputes and differences could preferably be settled without resort to court processes.

15. However, what does require serious consideration is the submission of learned counsel for HCL that the provision for an appellate arbitration in Clause 14 is prohibited by the laws of India on three counts: the provisions of the A&C Act do not sanction an appellate arbitration; there is an implied prohibition to an appellate arbitration in the A&C Act; and an appellate arbitration is even otherwise contrary to public policy. Appellate arbitration and the A&C Act.

16. Before actually discussing the validity of an appellate arbitration in the context of the A&C Act, it might be mentioned that it is doubtful if HCL can even contend that an appellate arbitration is contrary to the laws of India. If this contention is accepted, then it could be argued that HCL entered into a contract with Centrotrade fully conscious and aware that one of the provisions of the contract was contrary to the laws of India. This could amount to HCL playing a fraud on Centrotrade and could have serious long-term implications and ramifications for international commercial contracts with an Indian party.

17. But be that as it may, it might be fruitful as a starting point to consider the view expressed in the Report of the Working Group on International Contract Practices on the Work of its ***Third Session.***[5] Incidentally, India was one of the State members of that UNCITRAL Working Group. With reference to an appeal [before another arbitral tribunal (of second instance)] against an arbitral award, Question 6-1 was posed and answered as follows:

> "Question 6-1: Should the model law recognize any agreement by the parties that the arbitration award may be appealed before another arbitral tribunal (of second instance)?
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> 106. There was wide support for the view that parties were free to agree that the award may be appealed before another arbitral tribunal (of second instance), and that the model law should not Exclude such practice although it was not used in all countries. However, the Working Group was agreed that there was no need to include in the model law a provision recognizing such practice. It was noted, however, that this conclusion might have to be reconsidered in the light of the ultimate contents of the model law, and in particular its chapter on means of recourse against an award." [Emphasis supplied by us].

This view also throws open the issue of party autonomy, which we will advert to a little later. But for the present, we may also refer to the Handbook of Arbitration Practice[6] in which a reference is made to a two-tier system of arbitration particularly in commodity trade in the following words:

" Fundamental and ancient feature of commodity trade arbitration is the two tier system whereby the first arbitration is held speedily and relatively informally and results in the issuance of an award, which, subject to time limits, can be appealed by a dissatisfied party to a board of appeal of the relevant association. This gives a party two bites at the cherry and the arbitral process is not deemed to be concluded until the board of appeal has issued its final award In two tier systems, the awards of the tribunal, sole arbitrator or umpire are usually called awards of arbitration, to distinguish them from appeal awards issued by boards of appeal."

18. Our attention has also been drawn to several jurisdictions in which the statutory acceptance of a two-tier system of arbitration is prevalent, but it is not necessary to discuss this since the contention of learned counsel for HCL is that the law in India through the A&C Act is quite different.

19. Learned counsel for the parties agree that historically in India prior to the enactment of the A&C Act, two-tier arbitration was permissible. Justice Sinha adverted to the existence of a two-tier arbitration system in India prior to the A&C Act and referred to several decisions in this regard but did not pronounce on its validity or otherwise[7]. However, Justice Chatterjee was of the opinion that prior to the A&C Act a two-tier arbitration system was valid and *permissible in India*[8].

20. The significance of this is that Parliament must be assumed to have known the view of the UNCITRAL Working Group (of which India was a State member) and must be assumed to have known the decisions of various domestic courts and yet chose not to specifically prohibit the two-tier arbitration system. If that be so, we are entitled to proceed on the basis that even after the passage of the A&C Act, there can perhaps be no objection to the existence of a two-tier arbitration system. But we do not propose to base our decision on this assumption. We may, however, note that it has been brought to our notice that there are several decisions rendered by the Bombay High Court[9] that have accepted the two-tier arbitration system. There are several decisions of the Delhi High Court that have taken the view that since the A&C Act does not proscribe a two-tier arbitration procedure, such a system is acceptable[10].

21. Learned counsel for HCL relied upon the following passage from *Fuerst Day Lawson Limited v. Jindal Exports Ltd*[11]. to contend that since the A&C Act did not permit two-tier arbitrations such an arbitration system was not permissible:

"89. It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through to 2004 (in P.S. Sathappan[12]) was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining

to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar, J., that it carries with it "a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done". In other words, a letters patent appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded."

22. On the other hand, in *ITI Ltd. v. Siemens Public Communications Network Ltd*[13]. the question before this court was whether the provisions of the Civil Procedure Code were applicable to the A&C Act or not. In response, this ***Court observed***[14] that since there was no express provision excluding the provisions of the Code in the A&C Act, it cannot be held by inference that the provisions of the Code were inapplicable.

23. In any event, we are afraid the passage referred to by the learned counsel from Fuerst Day Lawson has been misunderstood and is even otherwise inapposite since we are not concerned with a statutory appeal but a non-statutory process agreed upon by parties that has nothing to do with court procedures. We are also unable to fully subscribe to the broad observation that acts mentioned in a statute are permissible but acts not mentioned therein are impermissible. It could very well be the converse. In any event, the observations of this Court were in the context of a statutory appeal not provided (or provided). In that context, it was observed that if an appeal is not provided for by a statute, then the filing of an appeal is not permissible. This was made clear many years ago by the Constitution Bench in *Garikapati Veeraya v. N. Subbiah Choudhry*[15] when it was concluded that:

"From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

> (v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise." [Emphasis supplied by us]. We are not concerned with an appeal not provided for by the A&C Act, but an appeal procedure mutually agreed upon by the parties to the contract. This is an area of party autonomy, which we will consider a little later, but for the present the next issue is whether the A&C Act prohibits a two-tier arbitration system by necessary implication.

24. Reference was first made by learned counsel for HCL to the provisions of sub-section (1) of Section 34 and then to Sections 35 and 36 of the A&C Act. These read as follows:

> "34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
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> 35. Finality of arbitral awards.—Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.
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> 36. Enforcement. (1) Where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court. (2) Where an application to set aside the arbitral award has been filed in the Court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.
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> (3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing: Provided that xxx xxx xxx"

25. We are unable to appreciate how these provisions come to the aid of learned counsel for HCL. Sub-section (1) of Section 34 of the A&C Act entitles a party to an arbitration to approach a court "only by an application" for setting aside an award. This is sought to be read by learned counsel in a different way to suggest that an award can be set aside only by a court, thereby excluding a two-tier arbitration procedure. If the contention of learned counsel were to be accepted, we would perforce have to read the sub-section quite differently by repositioning the word "only" and the sub-section to read: "Recourse only to a Court against an arbitral award may be made by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)." Or "Recourse against an arbitral award may be made only to a Court by an application for setting aside such award in accordance with sub-

section (2) and sub-section (3)." We are afraid we cannot read or redraft the statute in the manner suggested by learned counsel.

26. Learned counsel would like us to read sub-section (1) of Section 34 of the A&C Act in conjunction with Section 35 thereof and thereby conclude that an arbitral award would be final and binding unless it is challenged and set aside by a court and that the setting aside can be only by a court and none else. The acceptance of this submission would be possible only if we were to first accept the interpretation given by learned counsel to sub-section (1) of Section 34 of the A&C Act. However, since we do not agree with learned counsel on the interpretation of sub-section (1) of Section 34 of the A&C Act, acceptance of the contention of learned counsel does not arise.

27. In our opinion, on a combined reading of sub-section (1) of Section 34 of the A&C 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 A&C Act. This is precisely what the parties have in fact agreed upon and we see no difficulty in honouring their mutual decision and accepting the validity of their agreement.

28. The fact 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. The intention of Section 34 of the A&C Act and of the international arbitration community is to avoid subjecting a party to an arbitration agreement to challenges to an award in multiple forums, say by way of proceedings in a civil court as well under the arbitration statute. The intention is not to throttle the autonomy of the parties or preclude them from adopting any other acceptable method of redressal such as an appellate arbitration. In this context, the view expressed in the *Analytical Commentary On Draft Text of A Model Law on International Commercial Arbitration - Report of the Secretary-General*[16] is quite relevant. This commentary deals, inter alia, with Article 34(1) of the *Model Law on International Commercial Arbitration*[17] and it is stated as follows:

> "1. Existing national laws provide a variety of actions or remedies available to a party for attacking the award. Often equating arbitral awards with local court decisions, they set varied and sometimes extremely long periods of time and set forth varied and sometimes long lists of grounds on which the award may be attacked. Article 34 is designed to ameliorate this situation by providing only one means of recourse available during a fairly short period of time and for a rather limited number of reasons.
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> 2. The application for setting aside constitutes the exclusive recourse to a court against the award in the sense that it is the only means for actively attacking the

award, i.e. initiating proceedings for judicial review Finally, article 34(l) would not exclude recourse to a second arbitral tribunal, where such appeal within the arbitration system is envisaged (as, e.g., in certain commodity trades).[18]" [Emphasis supplied by us].

29. Similarly, the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006[19] also affirms this position in the following words:

> 44. The disparity found in national laws as regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonising international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time-periods for exercising the recourse, and extensive lists of grounds on which recourse may be based. That situation (of considerable concern to those involved in international commercial arbitration) is greatly improved by the Model Law, which provides uniform grounds upon which (and clear time periods within which) recourse against an arbitral award may be made. a. Application for setting aside as exclusive recourse
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> 45. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating "recourse" (i.e., the means through which a party may actively "attack" the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades)." [Emphasis supplied by us].

30. Learned counsel for HCL contended that since an award of the first Instance is final and binding on the parties under Section 35 of the A&C Act there cannot be an 'appeal' provision in the agreement between the contracting parties. The "final and binding" nature of an arbitral award (postulated by Section 35 of the A&C Act) has come up for consideration in this Court. This Court has taken the view that an award is not a waste paper only because it has not been enforced. The existence of an award has some legal consequences as well. In *Satish Kumar and Ors v. Surinder Kumar*[20] *paragraph 7* of the Schedule I of the *Arbitration* Act, 1940[21] was considered. This is almost in pari materia with Section 35 of the A&C Act. The question before this Court was: Whether an award given under the Arbitration Act, 1940 on a private reference requires registration under Section 17(1)(b) of the Indian Registration Act, if the award effects partition of immovable property exceeding the value of Rs.100/-?

31.In that case, this Court relied upon the following passage from *Uttam Singh Dugal & Co. v. The Union of India*[22] which held that once an award is made on a subject-matter, no action can be started on the original claim which had been the subject matter of reference. This Court was not concerned with any agreement between parties to subject the correctness of the award to further scrutiny through an 'appeal' procedure. It was held:

> "The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference. As has been observed by Mookerjee, J. in the case of *Bhajahari Saha Banikya v. Behary Lal Basak*[23] "the award is, in fact, a final adjudication of a Court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the fact of it regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive ... in reality, an award possesses all the elements of vitality, even though it has not been formally enforced, and it may be relied upon in a litigation between the parties relating to the same subject-matter." This conclusion, according to the learned Judge, is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to the judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has, in fact, or can, in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed." [Emphasis supplied by us].

32. This Court held that the above decision stated the correct position in law and was binding. This Court further adverted to paragraph 7 of Schedule I to the Arbitration Act, 1940 to state:

> "....We may mention that no comment was made in these cases on the provisions of para 7 of Schedule 1 to the Act. This para provides:
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> "7. The award shall be final and binding on the parties and persons claiming under them respectively."
>
> If the award is final and binding on the parties it can hardly be said that it is a waste paper unless it is made a rule of the Court."

33. In a separate opinion Justice Hedge held as follows:

> "..Arbitration proceedings, broadly speaking may be divided into two stages. The first stage commences with arbitration agreement and ends with the making of the award.

And the second stage relates to the enforcement of the award. Paragraph 7 of the First Schedule to the Arbitration Act lays down that "the award shall be final and binding on the parties and persons claiming under them respectively". Therefore it is not possible to agree with the Full Bench decisions of the Patna High Court and that of the Punjab and Haryana High Court that an award which is not made a decree of the Court has no existence in law. The learned Judges who decided those cases appear to have proceeded on the basis that an award which cannot be enforced is not a valid award and the same does not create any rights in the property which is the subject matter of the award. This in my opinion is not a correct approach. The award does create rights in that property but those rights cannot be enforced until the award is made a decree of the Court. It is one thing to say that a right is not created, it is an entirely different thing to say that the right created cannot be enforced without further steps." [Emphasis supplied by us].

34. It is therefore quite clear that the "final and binding" clause in Section 35 of the A&C Act does not mean final for all intents and purposes. The finality is subject to any recourse that an aggrieved party might have under a statute or an agreement providing for arbitration in the second instance. The award is binding in a limited context.

35. Unless this interpretation is accepted, a second instance arbitration would be per se invalid in India. This would be going against the grain of a long line of decisions rendered by various courts in the country which have accepted the validity of a two-tier arbitration procedure under institutional rules and have not taken the view that a two-tier arbitration procedure is per se invalid. Reference in this regard may be made to a somewhat recent decision rendered in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[24] wherein an award by the Board of Appeal of the Grain and Feed Trade Association, London was considered and upheld. Similarly in *Subhash Aggarwal Agencies v. Bhilwara Synthetics Ltd*[25]. the decision of an appellate Tribunal constituted under the Delhi Hindustan Mercantile Association Rules and Regulations was under consideration. Several other instances could be cited but that is not necessary. There are several decisions of several High Courts to the same effect and we see no error in the implicit acceptance of the general principle of two-tier arbitrations.
Party autonomy.

36. Party autonomy is virtually the backbone of arbitrations. This Court has expressed this view in quite a few decisions. In two significant passages in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc*[26]. this Court dealt with party autonomy from the point of view of the contracting parties and its importance in commercial contracts. In paragraph 5 of the Report, it was observed:

"Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract — (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as "curial law". The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in Sumitomo *Heavy Industries Ltd. v. ONGC*

> *Ltd*[27]., which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent *Reliance Industries Ltd. v. Union of India*[28]." [Emphasis supplied by us]. Later in paragraph 10 of the Report, it was held:
>
> "In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement." [Emphasis supplied by us].

37. In Union *of India v. Uttar Pradesh State Bridge Corporation Ltd*[29]. This Court accepted the *view* [30] that the A&C Act has four foundational pillars and then observed in paragraph 16 of the Report that:

> "First and paramount principle of the first pillar is "fair, speedy and inexpensive trial by an Arbitral Tribunal". Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to." [Emphasis supplied by us].

38. This is also the view taken in Law and Practice of ***International Commercial Arbitration wherein***[32] it is said:

> "Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration. It is a principle that is endorsed not only in national laws, but also by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law."

39. However, the authors in Comparative International Commercial Arbitration[33] go a step further in that, apart from procedure, they say that party autonomy permits parties to have their choice of substantive law as well. It is said:

> "All modern arbitration laws recognise party autonomy, that is, parties are free to determine the substantive law or rules applicable to the merits of the dispute to be resolved by arbitration. Party autonomy provides contracting parties with a mechanism of avoiding the application of an unfavourable or inappropriate law to an international dispute. This choice is and should be binding on the arbitration tribunal. This is also confirmed in most arbitration rules." [Emphasis supplied by us].

40. Be that as it may, the legal position as we understand it is that the parties to an arbitration agreement have the autonomy to decide not only on the procedural law to be followed but also the substantive law. The choice of jurisdiction is left to the contracting parties. In the present case, the parties have agreed on a two tier arbitration system through Clause 14 of the agreement and Clause 16 of the agreement provides for the construction of the contract as a contract made in accordance with the laws of India. We see nothing wrong in either of the two clauses mutually agreed upon by the parties. Public policy and two-tier arbitrations

41. The question that now arises is the interplay between public policy and party autonomy and therefore whether embracing the two-tier arbitration system is contrary to public policy.

42. Years ago, it was said per Burroughs, J in Amicable Society v. Bolland (Fauntleroy's Case) : "Public policy is a restive horse and when you get astride of it, there is no knowing where it will carry you." Perhaps to assist in getting over this uncertainty, *Mustill and Boyd* [34] identify four classes of provision regarded by the courts as contrary to public policy. They are: (i) Terms which affect the substantive content of the award; (ii) Terms which purport to exclude or restrict the supervisory jurisdiction of the Court; (iii) Terms which require the arbitrator to conduct the reference in an unacceptable manner; and (iv) Terms which purport to empower the arbitrator to carry put procedures or exercise powers which lie exclusively within the jurisdiction of the courts. Clause 14 of the agreement between the parties does not fall under any of these situations.

43. In our country, the case law on the subject has recently been exhaustively discussed and stated in *Associate Builders v. Delhi Development Authority*[35] and it is not necessary to revisit this. Briefly, it has been held that an award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) if it is patently illegal.

44. For the present we are concerned only with the fundamental or public policy of India. Even assuming the broad delineation of the fundamental policy of India as stated in Associate Builders we do not find anything fundamentally objectionable in the parties preferring and accepting the two-tier arbitration system. The parties to the contract have not by-passed any mandatory provision of the A&C Act and were aware, or at least ought to have been aware that they could have agreed upon the finality of an award given by the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. Yet they voluntarily and deliberately chose to agree upon a second or appellate arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. There is nothing in the A&C Act that prohibits the contracting parties from agreeing upon a second instance or appellate arbitration - either explicitly or implicitly. No such prohibition or mandate can be read into the A&C Act except by an unreasonable and awkward misconstruction and by straining its language to a vanishing point. We are not concerned with the reason why the parties (including HCL) agreed to a second instance arbitration - the fact is that they did and are bound by the agreement entered into by them. HCL cannot wriggle out of a solemn commitment made by it voluntarily, deliberately and with eyes wide open.

45. We decline to read the A&C Act in the manner suggested by learned counsel for HCL and hold that the arbitration clause in the agreement between the parties does not violate the fundamental or public policy of India by the parties agreeing to a second instance arbitration. It follows from our discussion that the award which is required to be challenged by HCL is the award rendered on 29th September, 2001 by the arbitrator in London.

Conclusion

46. 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.

Judgment Referred.

[1](2006) 11 SCC 245

[2] Chapter 24 Arbitration Award in Julian D. M. Lew, Loukas A. Mistelis, et al., Comparative International Commercial Arbitration, (© Kluwer Law International; Kluwer Law International 2003) pp. 627 - 662

[3] Chapter 9. Award in Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration (Sixth Edition), 6th edition (© Kluwer Law International; Oxford University Press 2015) pp. 501 - 568

[4] Part 4 : Chapter IV – The Arbitral Award in Emmanuel Gaillard and John Savage (eds), Fouchard Gaillard Goldman on International Commercial Arbitration, (© Kluwer Law International; Kluwer Law International 1999) pp. 735 - 780 concerns the merits of the dispute, jurisdiction, or a procedural issue leading them to end the proceedings."

[5] New York, 16-26 February, 1982, A.CN.9/216 (23rd March 1982)

[6] Published by Sweet and Maxwell in conjunction with The Chartered Institute of Arbitrators, (para 3-35) at p.276 and para 3-106 at p.290.

[7] Paragraphs 27, 65 and 119 of the Report

[8] Paragraph 136 of the Report Amin Merchant v. Bipin M. Gandhi, 2005 (Suppl.) Arb. LR 337, Dhansukh K. Sethia v. Rajendra Capital Services Ltd., 2008 (1) Arb. LR 368 (Bombay),

[9]Dowell Leasing & Finance Ltd. v. Radheshyam B. Khandelwal, 2008 (1) Bom C.R. 768, ANS Pvt. Ltd. v. Jayesh R. Ajmera, 2014 SCC Online Bom 1825 and Ankit Bimal Deorah v. Microsec Capital Ltd., 2015SCC Online Bom 4538

[10] Steel Authority of India Ltd. v. Engineers Project Ltd., 2014 SCC Online Del 2314, U.P. Rajya Vidyut Utpadan Nigam Ltd. v. Union of India, MANU/DE/3452/2015 and Rakesh Kumar Garg v. DSE Financial Service Ltd., MANU/DE/3339/2015

[11] (2011) 8 SCC 333
[12] P.S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672
[13] (2002) 5 SCC 510
[14] Per Justice Santosh Hegde with Justice D.M. Dharmadhikari concurring
[15] 1957 SCR 488
[16] Eighteenth Session, Vienna, 3-21 June 1985, A/CN.9/264 (25th March 1985)

[17] Article 34. Application for setting aside as exclusive recourse against arbitral award
(i) Recourse to a court against an arbitral award made [in the territory of this State]
[under this Law] may be made only by an application for setting aside in accordance with
paragraphs (2) and (3) of this article.

[18]A/CN.91264, 25 March 1985 https://documents-dds ny.un.org/doc/ UNDOC/ GEN/V85/267/01/PDF/V8526701.pdf? OpenElement

[19]http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07pdf

[20] (1969) 2 SCR 0244
[21] Paragraph 7, Schedule I: "The award shall be final and binding on the parties and persons claiming under them respectively"
[22] Civil Appeal No 162 of 1962 decided on 11th October, 1962 [Unreported decision]
[23] 33 Cal. 881
[24] (2014) 2 SCC 433
[25] (1995) 1 SCC 371 decided under the Indian Arbitration Act, 1940
[26] (2016) 4 SCC126, Hon'ble Judges/Coram: Anil R. Dave, Kurian Joseph and Amitava Roy, JJ.
[27] (1998) 1 SCC 305
[28] (2014) 7 SCC 603
[29] (2015) 2 SCC 52
[30] O.P. Malhotra on the Law and Practice of Arbitration and Conciliation" (3rd Edn. revised by Ms. Indu Malhotra, Senior Advocate
[31] Chapter 6. Conduct of the Proceedings in Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration (Sixth Edition), (© Kluwer Law International; Oxford University Press 2015) pp. 353 – 414, paragraph 6.07
[32] Chapter 17 Determination of Applicable Law in Julian D. M. Lew, Loukas A. Mistelis, et al., Comparative International Commercial Arbitration, (© Kluwer Law International; Kluwer Law International 2003) pp. 411 – 437, paragraph 17-8
[33] (1830) 4 Bligh. (N.S.) 194; 2 Dow. & Cl. 1
[34] The Law and Practice of Commercial Arbitration in England, London, Butterworths 1982 pp. 245-246
[35] (2015) 3 SCC 49