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A Critical Legal Analysis on Harmony Innovation Shipping Limited v. Gupta Coal India Limited

[AIR 2015 SC 1504

Sandeep Kumar Mohanty

ABSTRACT

Sandeep Kumar Mohanty [1]

The concept of fair result is an important and essential part of contract jurisprudence. It emanates from the interpretation of the implied covenants of a contract. Disputes pertaining to this arise when the contract does not express the nature of the disputes and the interpretation of the same in the manner as provided expressly in the contract would prejudice the interest of one of the contracting parties, thereby eliminating the opportunity of a fair result. The concept plays a pivotal role, while being read in conjunction with the doctrine of presumed intention, for the reason that presuming the right intention of the party will enable the parties to derive a fair result. In deciding cases based on these doctrines, courts more often than not overlook the primary issues for consideration i.e. would either of the parties be prejudiced by not considering the position of the parties? Would there be injustice being caused by not presuming the intention of the parties?

Keywords: Contract; Arbitration; Fair Result; Presumed Intention

INTRODUCTION

The determination of the intention of the parties to an arbitration agreement has always been a contentious issue. This aspect gets further complicated in case of multiple agreements between the parties. In furtherance of the said observation I tend to discuss the recent judgment of the Hon'ble Supreme Court of India in the case of **Harmony Innovation Shipping Limited v. Gupta Coal India Limited** [2] (hereinafter refer to as "**Harmony** case"). In light of this judgment, I endeavor to highlight the issue of interpretation of contracts and the much-discussed "doctrines of presumed intention" and "fair result". Moreover, I will also elucidate upon the issue related to implied and express inclusion of the jurisdiction of Indian courts in light of **Bharat Aluminum *Co. v. Kaiser Aluminum Technical Services Inc.***[3] *(herein after refer as "**BALCO** case") and **Bhatia International v. Bulk Trading S.A.***[4] *(herein after refer as "**Bhatia** case").* From time immemorial, the intention of parties has played the most crucial role in determining and adjudicating a dispute. To understand the intention of parties, when the same are not expressed by either of them, remains the most complex situation in the interpretation of contracts. While doing so, the courts have to weigh factors that go beyond the general reading of the contract. In such cases, the courts are required to

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[2] AIR 2015 SC 3504
[3] (2012) 9 SCC 552
[4] (2002) 4 SCC 105

weigh the presumed intention of the parties in order to deliver "fair result", thereby incorporating and applying to their optimum, the most crucial and intricate doctrines. In light of the decision of the Supreme Court in the present case of **Harmony**, this paper seeks to analyze and discuss the settled principles by highlighting the (1) factual matrix (2) arguments canvassed by the parties (3) judicial analysis by the Supreme Court (4) ratio delivered (5) a constructive analysis of the application of the concepts in the judgment and (6) conclusive remarks. After proper scrutiny of the aforementioned, I conclude that the Supreme Court, in the case of **Harmony**, deviated from the path set out by **BALCO** and thus, amplified the prevailing uncertainty relating to interpretation of arbitration agreements.

FACTUAL MATRIX

1. An agreement was entered into between the parties on 20th October 2010 i.e. Principal Agreement in respect of 24 voyages of coal shipment belonging to Harmony Innovations Shipping Limited (hereinafter refer to as "Appellant") from Indonesia to India. M/s Gupta Coal India Limited (herein after refer to as "Respondent") undertook only 15 voyages and that resulted in disputes which stood referred to arbitration.
2. Notably, an addendum to the Principal Agreement was executed with regards to the remaining voyages on 3rd March 2013, while disputes arose in respect of the Principal Agreement. Arbitration proceedings were initiated with regard to the disputes arising out of the Principal Agreement and eventually an award was passed.
3. Following the passing of the award, with respect to the Principal Agreement, the Appellant filed an application before the District Court, Ernakulum seeking enforcement of the Award under the provisions of the Arbitration and Conciliation Act, 1996 (herein after refer to as "Act").
4. In the interim, certain disputes arose between the parties in relation to the addendum, and arbitration proceedings were initiated by invoking the arbitration clause therein with regard to the said disputes. Faced with this situation, the Appellant filed an application under the Act seeking attachment of the cargos as an interim relief. The learned 2nd Additional District Judge, Ernakulum allowed a conditional order of attachment as was prayed.
5. The said interim order was assailed by the Respondent before the High Court of Kerala on the ground that it was passed without jurisdiction and hence was unsustainable in law. This

contention was countered by the Appellant on the ground that the agreements were entered into prior to the decision in the case of **BALCO** and was essentially governed by the principles laid down in the case of **Bhatia**.

6. The Hon'ble High Court, having considered the Principal Agreement, the addendum and the decisions in **Bhatia** case and **Venture Global Engineering v. Satyam Computer Services Limited** [5], set aside the order on the foundation that Section 9 of the Act is limited to domestic arbitrations and has no applicability to international arbitrations. The High Court further held that clause 5 of the Principal Agreement, which is the arbitration clause, clearly spells out that the Principal Agreement is to be governed and construed according to English Law.
7. Thus, while the Principal Agreement does not provide for a law governing the arbitration clause itself, it only stipulates that the agreement or substantive law would be governed and construed according to English Law.
8. Further, the High Court dismissed the contention that since the addendum was entered into prior to **BALCO**, thus the principles laid down therein would not be applicable.[6] It held that such a declaration could not be regarded as having prospective effect. Therefore, the fact that the Principal Agreement was entered into prior to **BALCO** was found to have no bearing and the petition under Section 9 of the Act was held not maintainable. Subsequently, the order of the High Court was challenged before the Supreme Court.

ARGUMENTS CANVASSED BY THE PARTIES BEFORE THE SUPREME COURT

A. EXPRESSS OR IMPLIED CONCLUSION

The Appellants relied on the Supreme Courts decision in case of **Infowares Ltd v. Equinox Corp**,[7] wherein it was held that unless the provisions of Part I are excluded by agreement between the parties either expressly or by implication, they would apply even where the International commercial agreements are governed by the laws of another country. Referring to

[5] (2008) 4 SCC 190
[6] The High Court viewed the law laid down by the Supreme Court in **BALCO** as declaratory in nature, and to be considered the law at all times.
[7] (2009) 7 SCC 220

the arbitration clause in the instant case, the Appellant urged that there existed no express or implied exclusion of the applicability of Part I. Therefore, it was argued that the courts in India have jurisdiction and the Learned Additional District Judge had not erred in exercising jurisdiction.

To the contrary, the Respondent relied on the decision in **Reliance Industries Limited & Anr. v. Union of India**,[8] (herein after refer to as "Reliance Industries Ltd." case) wherein the Supreme Court discussed the principle stated in **Bhatia** case and went onto hold that since the juridical seat of arbitration was in London and the laws governing the arbitration would be the laws of England, Part I would necessarily be impliedly excluded.

B. PRESUMED INTENTION

Appellant to bolster the argument, contended that in the present case the agreement stipulates that the Principal Agreement is to be governed and construed according to English law and that the same would have to be interpreted as a part of "curial law" and not as "proper law" or "substantive law", thereby entailing that the same could not be equated with the seat of arbitration.[9] The Appellant, further added that to apply the principles of implied exclusion, a court has to test the "presumed intention" and it would be the duty of the court to adopt an objective approach and understand what could have been the intention of reasonable parties in the position of the actual parties to the contract.

To ascertain the "presumed intention" of the parties, the Respondent directed the Supreme Court attention to various phrases such as "arbitration in London to apply", arbitrators are to be members of the "London Arbitration Association" and the contract "to be governed and construed according to English Law" and that if the dispute is for an amount less than US$ 50000, the arbitration is to be conducted in accordance with the small claims procedure of the London Maritime Arbitration Association. Notably, since there was no reference to any other law in the arbitration clause, the Respondent emphasised that the "presumed intention" of the parties indicates that the juridical seat of arbitration was London.

[8] (2014) 7 SCC 603

[9] The Ghost of the Governing Law Returns: Lex Arbitri v. Curial Law in India by Abhinav Bhushan Februrary 2014; http://kluwerarbitrationblog.com/2014/02/26/the-ghost-of-the-governing-law-returns-lex-arbitri-v-curial-law-in-india/

C. EVALUATION OF FAIR RESULT

The Appellant submitted that the case at hand neither had an express nor implied exclusion of Part I of the Act. That being said, to establish implied exclusion of the jurisdiction of courts in India, the "presumed intention" of the parties would have to be tested. The intention of reasonable parties to the contract and the concept of "fair result" would have to be borne in mind by the court.[10] The application of the concept of "fair result" involves solving disputes according to commercial practice to arrive at a result considered fair in a particular business community. Courts must pay heed to the commercial background, the context of the contract and the circumstances of the parties so as to not lead to an unreasonable or unfair result.[11] Thus, the Appellant insisted that they would be in disadvantageous position if the Court were to hold Part I as inapplicable to the present case.

The Respondent contended that since the juridical seat was in London and the parties had entered into the addendum after BALCO on 3rd April 2013, it follows that the intended effect was to have the seat of arbitration in London. Further, a reference to Section 3 of the English Arbitration Act, 1996 (herein after refer to as "English Act") was made in this regard.

In this respect, the Respondent submitted that the juridical seat of the arbitration would be London since the parties had agreed upon the arbitrators to be commercial men who are members of the London Arbitration Agreement and that if the claim were for a lesser sum, the small claims procedure of the London Maritime Arbitration Association would be followed.

JUDICIAL ANALYSIS AND JUDGMENT BY THE SUPREME COURT

The Honorable Supreme Court analysed a plethora of decisions to establish the methodology adopted by it in the past, with respect to establishing the law governing the juridical seat in arbitration proceedings. In this regard, the Supreme Court considered two aspects :-

(i) Whether upon construction of the clause, the ratio held in **Bhatia** would not apply and instead the ruling in **Reliance Industries Ltd**. would apply?

[10] Groningen Journal of International Law; Procedural Fairness and Efficiency in International Arbitration., November 2015

[11] The Arbitral Role in Contractual Interpretation Joshua D. H. Karton , March 2015

(ii) Whether the execution of the addendum would attract the principles laid down in **BALCO** and oust the jurisdiction of courts in India?

With regard to the first proposition, the Supreme Court considered the "presumed intention" of the parties and the "fair result" of the construction of the arbitration clause in the present scenario.[12] According to the Court, from the provisions of the arbitration clause, it was clear that if any dispute or difference would arise under the charter, arbitration in London would apply, the arbitrators were to be commercial men who were members of the London Arbitration Association and the contract was to be construed and governed by English law. The arbitration for a lesser sum was to be conducted in accordance with the small claims procedure of the London Maritime Arbitration Association. Notably, no other provision in the agreement referred to any other law that would govern the arbitration clause.[13] The court also relied on Section 3 of the English Act, which states that the seat of the arbitration would mean the juridical seat of the arbitration.

With the aforesaid stipulations in mind, the Supreme Court appreciated that the "presumed intention" of the parties was to assign London as the juridical seat of the arbitration. Moreover, the commercial background, the context of the contract, the circumstances of the parties and in the background in which the contract was entered into, lead to the aforesaid conclusion.

With regard to the second proposition, the Supreme Court reasoned that Bhatia was rendered on 13th March 2002 and **BALCO** was delivered by the Constitution Bench on 6th September 2012. In the instant case, the arbitration agreement was executed prior to **BALCO** and the addendum came into existence only on 3rd April 2013. In this respect, the court held that the pronouncement in **Bhatia** would be applicable to the facts of the case, since there was nothing in the addendum to suggest any arbitration and in fact it was controlled and governed by the conditions postulated in the Principal Agreement.[14]

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[12] Foo Jong Peng and others v Phua Kiah Mai and another [2012] SGCA 55; http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/15016-foo-jong-peng-and-others-v-phua-kiah-mai-and-another-2012-sgca-55

[13] Business Dispute Resolution: Taking Arbitration Clause Seriously by Anurag K. Agarwal IIM Ahmedabad, September 2014

[14] Advanced course for justices handling commercial matters by Shruti Jane Eusebius, law associate National Judicial Academy, August (27-30) 2015

Further, the Supreme Court construed and thought it fit to interpret the arbitration clause as a proper or substantial clause as opposed to being a curial or a procedural one by which the arbitration proceedings are to be conducted and hence disposed to conclude that the seat of the arbitration will be at London.

The Supreme Court concurred with the High Court on the finding that the courts in India will not have jurisdiction. However, in doing so, the Court based its judgment on the principles laid down by **Bhatia** as opposed to **BALCO**. Therefore, the Supreme Court concurred with the conclusion arrived at by the High Court, but notably for different reasons, and accordingly dismissed the appeal.

A CONSTRUCTIVE ANALYSIS OF THE APPLICATION OF THE CONCEPT IN THE JUDGMENT

A. EXPRESS OR IMPLIED EXCLUSION

The issue of what amounts to "express" or "implied exclusion" of Part I of the Act has been the basis of several litigations before Indian courts. Hence, at this stage, it becomes imperative to properly understand the decision in **Bhatia**. In the said case, the agreement entered into between the parties contained an arbitration clause which provided that arbitration was to be as per Rules of Arbitration of the International Chamber of Commerce, 1998 (herein after refer to as "ICC Rules"). The parties had agreed that the arbitration was to be held in Paris, France. The respondent approached the Additional District Judge, Indore, Madhya Pradesh, with an interim prayer under Section 9 of the Act. The appellant raised a plea stating that the Indore Court had no jurisdiction and the application was not maintainable. The said contention was dismissed by the Additional District Judge, which found favour with the High Court. Before the Supreme Court, it was urged, on behalf of the appellant, that Part I only applies to arbitration where the place of arbitration is in India and Part II would apply to arbitration with a place outside India.[15] On the other hand, the respondent urged that unless the parties, by their agreement either expressly or impliedly exclude the provisions of the Act, Part I would also apply to all

[15] http://www.ijtr.nic.in/indexdigest.htm#Arbitration and Conciliation Act

international commercial arbitrations including those that take place in India.[16] In light of the contentions raised, the Supreme Court held that provisions of Part I would apply to all arbitrations and to all proceedings relating thereto.[17] Where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions.[18] In that case, the laws or rules chosen by the parties would prevail. The Supreme Court examined and held that Article 23 of the ICC Rules permitted parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application could be made under Section 9 of the Act.[19]

Interestingly, where the parties have designated a foreign proper law but not a seat of arbitration, the Supreme Court has, on two occasions, held that such a condition would not amount to an "implied exclusion" of Part I. In both **Indtel Technical Services Private Limited v. WS Atkins Rail Limited**[20] and **Citation Infowares Limited v. Equinox Corporation**[21] it was held that in international commercial arbitrations, where the governing law of the contract is a foreign law, Part I would still apply and that a mere choice of a foreign law as the governing law of the agreement cannot be construed as an express or implied exclusion of Part I.[22]

However, a slight departure was made in **Yograj Infrastructure Ltd. v. Ssang Yong Engg & Construction Co. Ltd**.[23] wherein the curial law regulating the procedure of the conduct of the arbitration was the Arbitration Rules of the Singapore International Arbitration Centre, 2007 ("herein after refer to as SIAC Rules"). The SIAC rules, vide Rule 32, state that where the seat of the arbitration is Singapore, the law of arbitration would be the International Arbitration Act of Singapore. By virtue of the aforesaid rule, the Court held that the proper law being the Singapore law, the Act would not apply to the arbitration proceedings. However, the Court opined that in

[16] http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/newsid/3136/html/1.html?no_cache=1
[17] http://indianlawwatch.com/practice/arbitration-judgments-reliance-industries/
[18] http://www.tcl-india.net/node/451
[19] Indtel Technical Services Private Limited V. WS Atkins Rail Limited; (2008) 10 SCC 308
[20] (2008) 10 SCC 308
[21] (2009) 7 SCC 220
[22] Sanjeev Kapoor, Court Implies Exclusion of Part I of the Arbitration Act in Favour of Alternative Law, International Law Office (June 30, 2011).
[23] (2011) 9 SCALE 567

the absence of any other stipulation in the arbitration clause with regard to the law governing the arbitration proceedings, it is well settled that the law governing the contract would apply.

As a welcome change, in **BALCO**, the Supreme Court outlined the crucial distinction between foreign and domestic awards under the Act. The Court clarified that Part I applies not only to arbitrations in India where both parties are Indian, but also to international commercial arbitrations which take place in India. The awards in arbitrations seated in India are domestic awards, distinguishable from foreign awards for the purposes of the Act.[24]

In the present case, the Supreme Court seems to have deviated from the trend that was set by **BALCO**, where it laid down clear interpretation of the provisions of the Act. To the contrary, the Court has, on the basis of the principles held in **Bhatia** and subsequent cases prior to **BALCO**, held that Part I would be applicable. However the construction of the present arbitration clause ousts the jurisdiction of the courts in India by invoking the principle of implied exclusion. To elucidate, the Supreme Court considered facts such as the law governing the contract was English law; the arbitral tribunal was to comprise of persons from the London Arbitration Association; and the English Act expressly stipulates in Section 3 that the seat of arbitration would mean the juridical seat of arbitration, and concluded, as per **Bhatia**, that the arbitration clause had impliedly excluded the jurisdiction of the courts in India.

It is my opinion that the Court ought to have dwelled on whether the disputes arising from the addendum fall within the parameters of **BALCO** or **Bhatia**. Such an exercise was crucial to examine whether the Court could exercise jurisdiction under Part I. In holding that the addendum was executed following **BALCO**, the Court could have considered and applied the doctrine of "presumed intention" to better understand that the parties may have designated the seat of the arbitration to be outside India, thereby ousting the jurisdiction of the Indian Courts under Part I, in accordance with **BALCO**.

B. DOCTRINE OF "PRESUMED INTENTION" AND "FAIR RESULT'

The doctrine of presumed intention and the test of fair result are imperative to determine the intention of the parties in a case where the intention is ambiguous or not clearly expressed in

[24] Marking their Territory by Umer Akram Chaudhry ; http://kluwerarbitrationblog.com/2012/09/13/marking-their-territory-bharat-aluminum-v-kaiser-aluminum-technical-services-2012/

the contract. However, the test to determine presumed intention would have to be undertaken by reading an agreement in its entirety and not limiting it to the dispute resolution clause.[25] In present decision the Supreme Court ought to have dwelled on the construction and interpretation of the Principal Agreement and the subsequent addendum while trying to determine the presumed intention of the parties. The application of the doctrine of presumed intention will have a bearing on the interpretation of contracts in general and with the intention of the parties in particular. Many a time, parties do not take into account the likelihood of the occurrence of an unforeseen event happening.[26] In such cases, either the concerned party could not perform a particular clause in the contract, and as a consequence is sued for the same, or is subject to consequences that are a part of the agreement. In such circumstances, the doctrine of presumed intention allows the Court to read into the intention of the parties.

It is now settled law that courts may imply terms which are necessary in order to repair an intrinsic failure of expression in the contract or in other words, imply terms which would express the presumed intention and give business efficacy to the contract. The said law has now been used in a plethora of decisions to understand and construe the intent of the parties to a contract and more particularly the interpretation of a vague arbitration clause. In light of the application of the doctrine of presumed intention, the court in the case of **Mitsubishi Heavy Industries Limited v. Gulf Bank**[27] held as under:

"It is of course both useful and frequently necessary when construing a clause in a contract to have regard to the overall commercial purpose of the contract in the broad sense of the type and general content, the relationship of the parties and such common commercial purpose as may clearly emerge from such an exercise. However, it does not seem to me to be a proper approach to the construction of a default clause in a commercial contract to seek or purport to elicit some self-contained 'commercial purpose' underlying the clause which is or may be wider than the ordinary or usual construction of the words which each sub-clause will yield."

In the present case, the Court while applying the said principles has only applied the same to the limited extent of interpreting the dispute resolution clause, whilst not taking into consideration more significant and essential components, namely;

[25] Law of and Procedure for Appointment of Arbitrators in India; https://www.hg.org/article.asp?id=27514
[26] Litigation and Dispute Resolution Review December 2015 by Allen And Overy.
[27] [1997] 1 Lloyd"s Rep. 343 (U.K.)

(i) The commercial background;

(ii) The context of the contract;

(iii) The circumstances of the parties; and

(iv) The background preceding the contract.

A constructive interpretation of the doctrine on the basis of the above components or parameters would have irresistibly lead in the direction of the presumed intention of the parties, thereby leading to a fair result. In the said case, the Court, in order to apply the doctrine to the fullest, ought to have taken into consideration the addendum in the context of the above parameters. [28] The non-consideration of the same has led to diluting the significance and importance of the application of the doctrine of presumed intention.

CONCLUSION

The case of **Harmony** was a great opportunity for the Supreme Court to consider and analyse the application of pivotal doctrines concerning contracts, which have not been applied and interpreted to their optimum. In cases where there are multiple contracts involving the same parties and that flow out of a common principal agreement, the non-application of the said doctrines and principles have left a dent in the interpretation of contracts.As in the present case, when parties are faced with a precarious situation of having multiple agreements which are executed in both the **Pre-BALCO** and **Post-BALCO** regimes. In such situations, the Court ought to have considered in depth, analysed and interpreted the contract in a constructive manner, applying the settled principles and doctrines. Had the Court applied the said principles and doctrines in the manner they ought to have been, the Court could have clarified the correct interpretation that has to be afforded in cases involving multiple agreements. The jurisdiction of courts in India in the context of international commercial arbitration remains a vexed issue.Lord Powell, J. said that "We can judge of the intent of the parties only by their words".[29] Over the last decade and a half, the Supreme Court has attempted to strike a balance between courts, arbitrators and parties involved, through a series of judicial pronouncements. The Apex Court

[28] The law quaterly review International Law in Domestic Courts: the Developing Framework PHILIP SALES Q.C. AND JOANNE CLEMENT, Volume 124 - July 2008.
[29] Idle v. Cooke, [1704] 2 Raym. 1149 (Great Britain)

could have cleared the air and clarified the various issues that have emerged **post–BALCO**, but has instead let the uncertainty propagate. The case of **Harmony** was a chance for the Supreme Court to set a precedential stance with regard to interpretation of contracts and the interpretation on the applicability of the principles of **Bhatia** and **BALCO**. The judgment, although on a fair reading, has arrived at a conclusion which is reasoned and rational, the same could have been better clarified and would have served as a precedent.