

BHATIA INTERNATIONAL v. BULK TRADING S.A.: An Interpretation of Statutes with Regards to Consequences in international arbitration

Aishwarya Padmanabhan*

The aim of this paper is to discuss in detail the interpretation of statutes in the field of international commercial arbitration by the Indian Courts with respect to consequences – that interpretation should be done so as to avoid any kind of absurdity, inconvenience, hardship and injustice. The paper takes the celebrated case of Bhatia International to see how the Court interpreted this tenet and applied to the judgment.

INTRODUCTION

“If a language used is capable of bearing more than one construction, in selecting the true meaning, regard must be had to the consequences, resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results.”¹

If the language used is capable of bearing more than one construction, in selecting the true meaning regard must be had to the consequences resulting from adopting the alternative constructions. A construction that result in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results.²

This was the approach that the Court took in the landmark case of *Bhatia International v. Bulk Trading SA*.³

Though *Bhatia International v. Bulk Trading S.A.* lays down propositions regarding the applicability of Part I to arbitrations conducted outside India, that have far- reaching effects⁴, this decision has significant value when it comes to reiterating fundamental principles and canons in the interpretation of statutes regarding consequences.

BHATIA INTERNATIONAL: CASE IN POINT WITH REGARD TO CONSEQUENCES IN INTERPRETATION OF STATUTES

This case involved a contract between the parties which provided for arbitration in Paris, following the rules of the International Chamber of Commerce. The Appellant entered into a contract with the 1st Respondent on 9th May, 1997.⁵ This contract contained an arbitration clause which provided that arbitration was to be as per the rules of the International Chamber of Commerce.

However, neither the proper law of the contract nor the proper law of the arbitration agreement was specified. Disputes arose between the parties and on 23rd October, 1997 the 1st Respondent

* 4th Year student of B.A.LLB (Hons.) (5 Years), WB National University of Juridical Sciences (WB NUJS), Kolkata

¹ *Bhatia International v. Bulk Trading SA*, (2002) 4 SCC 105, PER S.N VARIAVA, J at ¶15. (in C R DATTA, LAW RELATING TO COMMERCIAL AND DOMESTIC ARBITRATION (ALONG WITH ADR) 174 (Wadhwa Nagpur, 2008)

² The real role that is played by consideration of consequences in the process construction is correctly appreciated by Max Radin. According to him, of a decision has at all times been a controlling factor in the judicial process. Those courts who declare to be indifferent to the consequences of what they decide and act on it, they would be taking a long step towards the destruction of the judicial system. (33 Calif. L. Rev P.228) and referred in *Brij Gopal v. State of MP* (1978) MPLJ 70 75 as well as *Modern School v. Union of India* AIR 2004 SC 2236 (in G P SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 123 (WADHWA NAGPUR, 2006))

³ (2002) 1 Arb LR 675 : AIR 2002 SC 1432

⁴ JUSTICE R.S. BACHAWAT, LAW OF ARBITRATION AND CONCILIATION 2236 (Anirudh Wadhwa et al eds., 2010)

⁵ *Bhatia International Case*, ¶2

filed a request for arbitration with ICC. Parties had agreed that the arbitration be held in Paris, France. ICC had also appointed a sole arbitrator.⁶

Pending arbitration, the 1st Respondent sought to file an application under Section 9 before the before the IIIrd Additional District Judge, Indore, M. P. against the Appellant and the 2nd Respondent. Courts at Madhya Pradesh seeking an injunction order restraining the Petitioner from alienating/ transferring and/or creating third party right, disposing of, dealing with and/or selling their business assets and properties⁷. The issue thus was whether a Section 9 application would lie with respect to an arbitration conducted outside India. The arguments were however directed towards whether or not Part I would apply to such arbitrations. If it could be proved that Part I applies to arbitrations conducted outside India, then it would follow that the Section 9 application could be filed. If not, the application under Section 9 was not maintainable.

The Supreme Court in *Bhatia* case had held that Part I of the Arbitration and Conciliation Act would equally apply to international commercial arbitrations held outside India, unless any or all of the provisions have been excluded by agreement between the parties.

It was held here that in selecting out different interpretations, “the court will adopt that which is just, reasonable and sensible rather than that which is none of those things”⁸ as it may be presumed “that the Legislature should have used the word in that interpretation which least offends our sense of justice.”⁹ If the grammatical construction leads to some absurdity or some repugnance or inconsistency with the rest of the instrument, it may be departed from so as to avoid that absurdity, and inconsistency.¹⁰

The doctrine of consequences states that if any particular construction in construing the words of a statute was susceptible of more than one meaning, it was legitimate to consider the consequences which would result from any particular construction.¹¹

If the meaning is plain, effect must be given to it irrespective of consequences. However, this rule has no application when the words are susceptible to only one meaning and no alternative construction is reasonably open.¹² It is one of the well-settled rules of construction that if the words of a statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declare the intention of the legislature. Thus, the construction to avoid absurdity must be used with great caution.

It has been well-settled that where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion in to the working of the system.¹³ Further, it has been held that the harmonious rule of construction should be applied to statutory rules and the courts should avoid

⁶ *Bhatia International Case*, ¶3

⁷ *Bhatia International Case*, ¶3

⁸ Also in *Holmes v. Bradfield Rural District Council* (1949) 1 All ER 381, (KBD) (Finnemore, J.,) and *Nasiruddin v. State Transport Appellate Tribunal* AIR 1976 SC 331 on p. 338 (in G P SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 126 (WADHWA NAGPUR, 2006))

⁹ *Simms v. Registrar of Probates* (1900) AC 323, p.335 (PC) (Lord Hobhouse); *Union of India v. B.S. Agarwal* AIR 1998 SC 1537 (Held : Court to lean in favour of such interpretation which conforms to justice and fair play and prevents potentiality to injustice); *Paradise Printers v. Union Territory of Chandigarh* AIR 1988 SC 354 (Held: when there is a choice of meanings, there is a presumption that one which produces an unjust or inconvenient result was not intended); as well as *Sachida Nand Singh v. State of Bihar* AIR 1988 SC 1121 (in G P SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 126 (WADHWA NAGPUR, 2006))

¹⁰ *Shamrao v. District Magistrate, Thana* AIR 1952 SC 324 (Held: The object of the construction of a statute being to ascertain the will of the Legislature, it may be presumed that neither injustice nor absurdity was intended. If, therefore literal interpretation would produce such a result, and the language admits of an interpretation which avoids it, then such an interpretation may be adopted.) (in G P SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 127 (WADHWA NAGPUR, 2006))

¹¹ AVTAR SINGH, INTRODUCTION TO INTERPRETATION OF STATUTES 46 (Wadhwa Nagpur Company, 2005)

¹² VEPA SARATHI, INTERPRETATION OF STATUTES 663, 665 (Eastern Book Company, 2003)

¹³ *Ibid.*

absurd or unintended results.¹⁴ It should be resorted to making the provision meaningful in the context.¹⁵ It should be in consonance with the intention of Rule- makers.¹⁶

The object of the 1996 Act was to establish a uniform legal framework for fair and efficient settlement of disputes arising in International Commercial Arbitration.¹⁷ Thus, with the above principles in mind, the Court in the instant case supported its judgment on a harmonious interpretation between the various sub-sections of Section 2 of the 1996 Act.

The Court had also reiterated that principles of statutory interpretation provide that in case a strict interpretation leads to absurd consequences, the courts are duty bound to add or modify the express terms of a provision to further the objectives of the legislation in question¹⁸ and thus, held that Section 2(2) of the 1996 Act must be interpreted to include international commercial arbitrations held within as well as outside India. This was done by reading the provision as it is, without supplying the word 'only' into it. Such an interpretation is supported by general principles of statutory construction and must, therefore, be upheld.

Further, the Court sought to avoid a conflict that would have arisen between Section 2(2) on the one hand and Sections 2(4) and 2(5) on the other, had Section 2(2) been given a restrictive interpretation. A restrictive understanding of Section 2(2) which renders Part I of the 1996 Act applicable only to arbitrations held in India would bring the said section in direct confrontation with Sections 2(4)¹⁹ and 2(5)²⁰ which expressly make the 1996 Act applicable to all arbitrations without differentiating between arbitrations held in India and those held outside.²¹ It was incumbent upon the Court to avoid such a conflict between the provisions of the 1996 Act, which could have been achieved only through the interpretation which it adopted.

The interpretation undertaken by the Court was done so as to avoid absurd and anomalous consequences. For instance, if Section 2(2) of the 1996 Act was interpreted so as to restrict the application of Part I to arbitrations held in India alone, this would create a situation whereby awards rendered in India would be covered by Part I of the 1996 Act,²² and foreign awards, i.e., awards made in territories which are parties to the New York Convention and have been notified as reciprocating territories by the Government of India, would be governed by Part II of the Act.²³ However, where an award is made in a non-convention territory, neither Part I nor Part II would apply to it.²⁴ In other words, in the event an Indian court was called upon to enforce an award made in a non-convention country, it would have to act in complete absence of statutory guidance

¹⁴ "The basis of the principle of harmonious construction is that the legislature never intends to contradict itself by providing two repugnant provisions in the same statute. The Act has to be read as a whole and its provisions have to be harmoniously giving effect to all of them." (East India Hotels Ltd. v. Union of India (2001) 1 SCC 284 (in VEPA SARATHI, INTERPRETATION OF STATUTES 663, 665 (Eastern Book Company, 2003). Also see Keshav Chandra Joshi v. Union of India 1992 Supp. (1) SCC 272, 278 (in AVTAR SINGH, INTRODUCTION TO INTERPRETATION OF STATUTES 46 (Wadhwa Nagpur Company, 2005)

¹⁵ M.J. Exports Ltd v. CEGAT 1993 Supp (1) SCC 169 (in AVTAR SINGH, INTRODUCTION TO INTERPRETATION OF STATUTES 46 (Wadhwa Nagpur Company, 2005)

¹⁶ Union of India v. Harman Singh (1993) 2 SCC 162 (in AVTAR SINGH, INTRODUCTION TO INTERPRETATION OF STATUTES 46 (Wadhwa Nagpur Company, 2005)

¹⁷ C R DATTA, LAW RELATING TO COMMERCIAL AND DOMESTIC ARBITRATION (ALONG WITH ADR) 52 (Wadhwa Nagpur, 2008)

¹⁸ Shyam Kishori Devi v. Patna Municipal Corporation, 1966 (3) SCR 466; Management, Shahdara (Delhi) Saharanpur Light Rly.Co. Ltd. v. S.S. Rly. Workers Union, AIR 1969 SC 513; S. Narayanswami v. G. Panneerselvam, (1972) 3 SCC 717; Union of India v. Sankalchand, (1977) 4 SCC 193; A.R. Antuley v. Ramdas Srinivas Nayak, (1984) 2 SCC 500; State of Maharashtra v. Nanded Prabhani Operator Sangh, (2000) 2 SCC 725; Grasim Industries Ltd. v. Collector of Customs, (2002) 4 SCC 279; Harbhajan Singh v. Press Council of India, (2002) 3 SCC 722; Sakshi v. Union of India, (2004) 5 SCC 518. (in C R DATTA, LAW RELATING TO COMMERCIAL AND DOMESTIC ARBITRATION (ALONG WITH ADR) 53 (Wadhwa Nagpur, 2008))

¹⁹ See Section 2(4), Arbitration and Conciliation Act, 1996. "This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provision of this Part are inconsistent with that other enactment or with any rules made thereunder"

²⁰ See Section 2(5), Arbitration and Conciliation Act, 1996. "Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto"

²¹ Bhatia International Case, ¶22

²² See Section 2(2) of the Arbitration and Conciliation Act, 1996

²³ See Section 44 of the Arbitration and Conciliation Act, 1996

²⁴ Bhatia International Case, ¶14

and in effect, legislate on the matter. This would be absurd considering the long history of legislation on arbitration in India and the presumption that the Legislature would not have left a lacuna in the law. Thus, the interpretation by the Court was rightly done so as to circumvent any kind of lacuna that could have resulted from any other interpretation with respect to the non-Convention countries.

In addition, the interpretation given by the Court did not give a restrictive interpretation to Section 2(2) which would have led to an absurdity when read with the proviso to Section 1(2) of the 1996 Act. Section 1(2) provides that the 1996 Act applies to the entire territory of India. However, the proviso to Section 1(2) restricts the application of Part I with respect to the State of Jammu and Kashmir to international commercial arbitrations alone.²⁵ It is pertinent to note that no distinction whatsoever has been made in this proviso between international commercial arbitrations held in India and outside. If a restrictive interpretation was accorded to Section 2(2), Part I of the 1996 Act would apply to the State of Jammu and Kashmir, by virtue of the proviso to Section 1(2), in case of all international commercial arbitrations, whether held in India or outside whereas for the rest of the country, Part I would apply only to international commercial arbitrations held in India. This anomaly of consequences had been sought to be avoided through the interpretation adopted in *Bhatia International*.

CONCLUSION

When laws are made by the representatives of the people, it is proper to assume that law-makers enact laws which the society considers as honest, fair and reasonable and thus, justice and reason constitute the general legislative intent in every piece of legislation. In the absence, therefore, of some other indication that harsh or ridiculous effect was actually intended by the legislature, it cannot be readily accepted that it represents the legislative intent. Thus, this has been exemplified in the *Bhatia International* case.

The Court was correct departing from such an interpretation so as to prevent an absurdity in the outcome such as a lacuna in law. Moreover, the interpretation accorded by the Court so as to achieve the purpose of the legislation as it ensures that the parties do not evade performance of their obligations under the award by alienating assets situated in India and is in consonance with the world's leading arbitral institutional rules.²⁶

The Court restricted the application of Part I to arbitrations held in India alone and so, no party to an arbitration held outside India could approach an Indian court for an interim measure of protection under Section 9 of the 1996 Act since there is no corresponding protection in Part II of the 1996 Act. In such an event, a party to an arbitration held outside India would have no means of ensuring that the other party did not evade performance of its obligations under the expected award by alienating assets situated in India. Leaving a party without such recourse would undermine the credibility of arbitrations held outside India to which one of the parties is Indian and would undermine the confidence of parties and especially foreign parties in the Indian arbitral process.

Thus, it is submitted that the 1996 Act was enacted to further the institution of arbitration and help international trade and commerce.²⁷ While interpreting the 1996 Act, this purpose has to be kept in mind and an interpretation which best fulfils this purpose is to be given effect to. It is submitted that the interpretation adopted in *Bhatia International* serves this very purpose of facilitating arbitration as a mode of alternate dispute resolution and therefore avoids any sort of absurd or uncertain consequences that could discourage international trade and commerce in India.

²⁵ See Section 1(2) and 2(2), Arbitration and Conciliation Act, 1996.

²⁶ Most of the procedural rules clearly indicate that the choice of the parties to arbitrate under them does not constitute a waiver of the rights of the parties to approach a court for interim measures of protection. These rules do not limit the rights of parties to approach courts by stating that the parties can do so only in the country where the tribunal is seated. Such an approach not only makes jurisdiction arbitration friendly, but also ensures that parties are not rendered remediless. (See Rules of the London Court of International Arbitration (LCIA), ICC Rules.)

²⁷ "It is obvious that since the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction." (*Renusagar Power Plant Co. Ltd. Vs. General Electric Co.*, AIR 1994 SC 860, ¶53)

BIBLIOGRAPHY

PRIMARY SOURCES

Statutes

Arbitration and Conciliation Act, 1996

Rules

ICC Rules

Rules of the London Court of International Arbitration (LCIA)

International Conventions, Treaties and Documents

New York Convention, 1958

SECONDARY SOURCES

Arbitration: Procedure and Practice, Ashwini Bansal, Lexis Nexis, Haryana, 2009

Interpretation of Statutes, B. M. Gandhi, First Edition, Eastern Book Company, 2006

Interpretation of Statutes, Vepa P. Sarathi, Fourth Edition, Eastern Book Company, 2003

Introduction to Interpretation of Statutes, Avtar Singh, First Edition, Wadhwa Nagpur, 2005

Justice Bachawat's Law of Arbitration and Conciliation, Justice R.S. Bachwat, K.K. Venugopal (General Editor), Wadhwa and Company Nagpur, Fourth Edition, New Delhi, 2005

Justice G. P. Singh's Principles of Statutory Interpretation, G. P. Singh, 10th Edition, Wadhwa Nagpur, 2006

Law and Practice of Arbitration and Conciliation: The Arbitration and Conciliation Act 1996, O.P. Malhotra, Second Edition, Lexis Nexis, New Delhi, 2006

Law of Arbitration and Conciliation, B. P. Saraf, Fifth Edition, Snow White Publishers, Mumbai, 2009

Law Relating to Arbitration and Conciliation, P.C. Markanda, Sixth Edition, Wadhwa and Company Nagpur, New Delhi, 2006

Master Guide to Arbitration in India, D. Rautray, First Edition, Walter Kluwer Pvt. Ltd., New Delhi, 2008

N.D. Basu on Law of Arbitration and Conciliation, P.K. Majumdar, Tenth Edition, Orient Publishing Co., New Delhi, 2005

Sarkar's Principles of Statutory Interpretation, S.C. Sarkar, First Edition, Dwiwedi Law Agency, 2008

The Arbitration and Conciliation Law of India: with Case Law on UNCITRAL Model Law on Arbitration, G. K. Kwatra, The Indian Council of Arbitration, New Delhi, 2003