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Supreme Court restricts the scope of Patent Illegality **Delhi Airport Metro Express (P) Ltd. v. Delhi Metro Rail Corporation Ltd.**

Citation	2021 SCC OnLine SC 695
Date	09 September 2021
Court	Supreme Court of India
Coram	Hon'ble Mr. Justice L. Nageswara Rao, Hon'ble Mr. Justice S. Ravindra Bhat

1. FACTUAL MARTIX & PROCEDURAL HISTORY:

- 1.1 Delhi Metro Rail Corporation (“**DMRC/Respondent**”) entered into a Concession Agreement (“**Agreement**”) with a consortium led by Reliance Infrastructure Ltd. viz., Delhi Airport Metro Express Pvt. Ltd. (“**DAMEPL/Appellant**”). DMRC undertook the design and construction of the civil structure whereas, DAMEPL’s scope of work included design, supply, installation, testing, and commissioning of the Airport Metro Express Line (“**AEML**”).
- 1.2 Following the achievement of the commercial operations date, DAMEPL requested DMRC for a joint inspection of the viaduct and its bearing before the expiry of the defect liability period. Significantly, DAMEPL complained of issues relating to design and quality in the installation of viaduct bearings. Signs of sunk girders were also observed as a result of cracks. Since the defects were not cured within the prescribed time, DAMEPL construed the same to be a material breach and thus, terminated the Agreement. Accordingly, DMRC invoked arbitration in accordance with the Agreement.

A. Proceedings before the Arbitral Tribunal:

- 1.3 After an in-depth analysis of the dispute, the Arbitral Tribunal observed that DMRC had primarily failed to cure the defects within the prescribed time, and accordingly this failure constituted a material breach. Thus, the termination notice issued by DAMEPL was valid. The Arbitral Tribunal passed an award that directed DMRC to pay Rs. 2,782 Crores along with interest to DAMEPL.

B. Proceedings before the Hon’ble Delhi High Court:

- 1.4 DMRC filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (“**the Act**”) praying for setting aside the award on the ground of patent illegality and being against the public policy of India. Given the narrow scope of interference under Section 34, the learned single judge dismissed the application. Aggrieved, DMRC filed an appeal under Section 37 of the Act before the Division Bench.
- 1.5 The Division Bench noted that the award suffered from vices of perversity and irrationality. The underlying reason was pointed towards the award that recorded two different termination dates that created confusion. The Division Bench also dissected the award and adopted an alternative view that was also a plausible one but not adopted by the Arbitral Tribunal. Consequently, the award of Rs. 2,782 Crores was set aside.
- 1.6 Distraught by the judgment of the Division Bench, DAMEPL filed a Special Leave Petition (“**SLP**”) before the Hon’ble Supreme Court (“**Supreme Court**”). Significantly, even DMRC filed a separate SLP praying for specific performance.

2. ISSUE:

- 2.1 Whether the Division Bench of Hon’ble Delhi High Court erred in its judgment by setting aside the award and deviating from the settled principles for interference under Sections 34 and 37 of the Act?

3. CONTENTIONS OF THE APPELLANT:

- 3.1 At the outset, DAMEPL assailed the judgment of the Division Bench on the ground that it had failed to remain within the restrictive scope of Section 34 and 37 of the Act. It was further contended that findings of facts that are recorded by the Arbitral Tribunal are not open to review under Section 34. Even if the court has an alternative

interpretation that is a plausible one, it could not have been substituted with the one recorded by the Arbitral Tribunal.

- 3.2 Insofar as the confusion regarding two separate termination dates was mentioned by the Division Bench, it was argued that on 09 July 2012, the cure notice was issued that gave DMRC 90 days to cure the defects. Accordingly, after the expiry of 90 days i.e., on 08 October 2012, the termination notice was issued. Thus, there could have been no doubt or confusion regarding the same.

4. CONTENTIONS OF THE RESPONDENT:

- 4.1 DMRC contended that the 90-day period did not lapse on 08 October 2012, but it was further extended for 90 days starting from 08 October 2012. This was based on the interpretation of the Agreement.
- 4.2 DMRC argued that since the Commissioner of Metro Railways is the sole authority to determine the safety, their certificate dated 18 January 2013 was conclusive proof regarding the cure of the defects. DMRC further submitted that this certificate is only granted after considering all safety aspects and the AMEL has been in operation since then without any adverse event.

5. JUDGMENT:

A. *Judicial Contours under Section 34:*

- 5.1 Firstly, the Supreme Court appositely examined the extent of judicial contours under Section 34 of the Act. In this regard, it was held that given the primary objective of the Act to minimize judicial intervention in the arbitral process, the grounds under Section 34 are to be construed narrowly. Pertinently, the courts must refrain from appreciation or re-appreciation of facts or law under Section 34.
- 5.2 Pertinently, the Supreme Court also delineated the limited instances when interference by courts is permissible. This includes cases wherein the arbitrator takes a view that no prudent or reasonable person could have taken or if the arbitrator commits an error of jurisdiction by wandering outside the four walls of the contract. Additionally, addressing issues that did not form part of the reference is another ground where courts may interfere with the award.

B. *Constituents of Patent Illegality:*

- 5.3 Since the Division Bench had held the award to be patently illegal, the Supreme Court examined Section 34(2A) of the Act to that extent. It was reiterated that patent illegality should only be illegality that goes to the root of the matter and must not be superficial. Moreover, every error of law would not fall under the ambit of patent illegality, and neither would every erroneous application of the law. It was clarified that an award would be patently illegal if and when it is based on no evidence, or ignores vital evidence, or fails to state reasons.¹
- 5.4 The Supreme Court discerned that a disturbing tendency has been created whereby courts set aside the award after dissecting and reassessing factual aspects of the case and conclude that the award warrants interference. Thus, the courts invariably dub the award to be vitiated by either perversity or patent illegality. It was observed that this practice is leading to the corrosion of the primary objectives of the Act and turning judicial pronouncements into a dead letter.

¹ Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (2019) 15 SCC 131.

C. Constituents of Public Policy:

5.5 Significantly, the constituents of public policy of India were also reiterated. It was held that the judgment in *Ssangyong*² had wisely relegated the regime back to *Renusagar*³ insofar as public policy of India was concerned. It was further clarified that contravention of a statute only if it is linked to public policy will become a ground for setting aside the award as being in conflict with the fundamental policy of Indian law. Additionally, if the arbitral award shocks the conscience of the court, it will be considered to be in conflict with basic notions of justice.

D. On Merits:

5.6 The Supreme Court disagreed with the judgment of the Division Bench regarding the dates of termination. There was no ambiguity in discerning that DAMEPL had granted the exact time period as stated in the Agreement and only then issued the notice of termination. Thus, the termination notice was valid.

5.7 The Supreme Court then upheld the findings of the Arbitral Tribunal concerning the validity of the certificate issued by CMRS. The Arbitral Tribunal had not lost sight of the binding nature of the certificate but had held that DMRC could not hide under the guise of the certificate and contend that defects had been cured.

5.8 On the amount of compensation that was awarded to DAMEPL, the Supreme Court held that the inclusion of the capital cost under adjusted equity by the Arbitral Tribunal was a plausible view and no alternative view could substitute the same.

5.9 Lastly, given the confines of Section 34 of the Act, the Supreme Court held that the Division Bench had erred on dual fronts *viz.*, (i) by re-appreciating facts and (ii) by substituting its view with that of the Arbitral Tribunal. Accordingly, the Supreme Court set aside the judgment of the Division Bench and restored the arbitral award that was passed in favour of DAMEPL.

6. PSL OPINION:

6.1 The present judgment of the Supreme Court reinstates the restrictive scope of interference that courts have under Section 34 of the Act. The observations made by the Division Bench reflected its approach that is akin to a civil court while adjudicating an appeal.

6.2 The Supreme Court also reiterated the limited constituents of patent illegality and public policy of India that goes to show the pro-enforcement stance that is being maintained in an attempt to promote the arbitral process and not diminish faith in the same.

6.3 Significantly, arbitral awards arising out of construction disputes are often road-blocked due to the increased tendency of the award-debtor to file an application for setting aside the award. During this period, the legitimate award-holder may suffer from cash flow crunch that is likely to have a snowballing impact on its involvement in other projects. Therefore, the courts must also take these factors into account and endeavor to expeditiously decide such disputes.

² *Id.*

³ *Renusagar Power Co. Ltd. v. General Electric Co.*, 1993 Supp (1) SCC 644.