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Supreme Court Sets Aside an Arbitral Award in Favour of Delhi Metro Rail Corporation under Curative Jurisdiction on the Ground of Grave Miscarriage of Justice

Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express (P) Ltd. [2024 SCC OnLine SC 522]

Hon'ble Supreme Court of India

Hon'ble Dr. Justice D.Y. Chandrachud, Chief Justice of India, Hon'ble Mr. Justice B.R. Gavai and Hon'ble Mr. Justice Surya Kant

10 April 2024

I. Factual Matrix

1.1 In 2008, the consortium comprising of Reliance Infrastructure Limited and Construcciones Y Auxiliar de Ferrocarriles SA, Spain secured the contract for construction, operation and maintenance of the Delhi Airport Metro Express Limited (**'DAMEPL'**) from Delhi Metro Rail Corporation Limited (**'DMRC'**). The Concession Agreement (**'Concession Agreement'**) envisaged a unique public-private partnership for providing metro rail connectivity between New Delhi Railway Station and the Indira Gandhi International Airport.

1.2 In terms of contractual obligations, DAMEPL held exclusive rights, licence and authority to implement the project and concession *qua* the Airport Metro Express Line (**'AMEL'**). Whereas, DMRC undertook the responsibility for clearances and bear costs related to land acquisition and civil structures. The work was to be completed within a period of two years. Thereafter, DAMEPL was required to maintain AMEL until August 2038.

1.3 In April 2012, DAMEPL requested a deferment of the concession fee owing to delays in providing access to the stations by DMRC. Pursuant to an exchange of communications, the Ministry of Urban Development convened a meeting and set up a Joint Inspection Committee to inspect the defects notified by DAMEPL. In the interim, DAMEPL conveyed its intention to halt operations due to safety concerns. Accordingly, operations were stopped on 08.07.2012.

1.4 On 09.07.2012, DAMEPL notified non-exhaustive defects which pertained to project safety. DAMEPL stated that the defects caused a 'material adverse effect' on the performance of obligations and DMRC was contractually bound to cure the defects within 90 days, failing which, it would constitute a DMRC event of default. Subsequently, on 08.10.2012, DAMEPL notified the termination of the concession agreement stating that the 90 days period had elapsed and the defects remained uncured.

1.5 Upon termination, DMRC attempted conciliation, which eventually failed. Thereafter, DMRC initiated arbitration proceedings. Albeit, the Commissioner of Metro Rail Safety ('CMRS') had sanctioned the commencement of the AMEL, the same was subject to terms and conditions. Consequently, on 30.06.2013, the project assets were handed over by DAMEPL to DMRC.

1.6 In August 2013, a 3-member arbitral tribunal was constituted which passed a unanimous award in favour of DAMEPL. After undertaking an in-depth and technical analysis of the issues, the arbitral tribunal held that the defects notified by DAMEPL compromised the integrity of the structure which remained uncured by DMRC. Consequently, the same tantamount to a breach of DMRC's obligations resulting in material adverse effect. On the sanction of the CMRS, the arbitral tribunal noted that since the objective of AMEL was to serve a high-speed line, the restrictions imposed by CMRS indicated that the purpose of the AMEL was not served.

II. Procedural History

2.1 DMRC assailed the arbitral award before the Hon'ble Delhi High Court (**'High Court'**) under Section 34 of the Arbitration and Conciliation Act, 1996 (**'the Act'**). The Hon'ble High Court held that the award was reasonable and adopted a plausible interpretation thereby warranting no interference.[1]

2.2 DMRC assailed the decision of the Learned Single Judge under Section 37 of the Act which partly set aside the award as being perverse and patently illegal.[2] The decision of the Hon'ble High Court under Section 37 of the Act was premised on: *(i)* ambiguity in the date of termination; (ii) speed restrictions did not constitute a reason for termination; and (iii) the CMRS certificate was binding on the arbitral tribunal and could not have been treated as irrelevant.

2.3 Being aggrieved by the decision of the Hon'ble High Court, DAMEPL approached the Hon'ble Supreme Court of India (**'Supreme Court'**) by way of a Special Leave Petition (**'SLP'**) under Article 136 of the Constitution of India, 1950 (**'Constitution'**). The Supreme Court set aside the decision of the High Court and restored the arbitral award on the following basis: (i) interpretation of the termination date was squarely within the exclusive domain of the tribunal; (ii) the default in curing defects was a finding of fact not warranting interference; (iii) DMRC never contended that the CMRS certificate was binding and conclusive of the fact that the defects were cured or effective steps were undertaken by DMRC; and (iv) the High Court erred in holding that the issue of CMRS certificate was wrongly separated from the issue of defects.[3]

2.4 Subsequently, the Review Petition against the judgment of the Supreme Court was dismissed on 23.11.2021.[4] Thereafter, DMRC invoked the curative jurisdiction of the Supreme Court (**'Curative Petition'**) which culminated into the present decision.[5]

III. Issues

3.1 Maintainability of the Curative Petition; and

3.2 Whether the Supreme Court was justified in restoring the arbitral award which had been set aside by the High Court on the ground of patent illegality.

IV. Contentions

Contentions on behalf of the Petitioner:

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[1] Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited, 2018 SCC OnLine Del 7549.
[2] DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562.
[3] Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131.
[4] Order dated 23.11.2021 in Review Petition (C) Nos. 1158-1159 of 2021.
[5] DMRC v. Delhi Airport Metro Express (P) Ltd., 2024 SCC OnLine SC 522.

4.1 There were no material adverse effect that is apparent from the running of the metro line and as effective steps were undertaken by DMRC culminating in cure compliance, the termination notice was invalid;

4.2 The termination clause envisaged the first 90 day period followed by another 90 days in addition and thus, the termination was only effective on 07.01.2013 and as on the said date, none of the defects were pending to be rectified;

4.3 The arbitral tribunal should have considered the binding effect of the CMRS sanction as the AMEL had been running since 01.07.2013 and the smooth operation of the metro line was ignored by the tribunal making the award perverse;

4.4 The continuous running of the metro line depicts that the defects did not render the metro unviable nor interfered with DAMEPL's obligation and on this count, the award is perverse and patently illegal;

4.5 Miscarriage of justice is linked with patent illegality; and

4.6 As the issuance of the CMRS certificate is statutorily codified, the CMRS is the final authority to decide in the safety of the metro and the certificate could not have been substituted by the arbitral tribunal's finding on the safety of the line.

Contentions on behalf of the Respondent:

4.7 The Curative Petition is not maintainable as the Supreme Court cannot revisit the conclusions of the arbitral tribunal;

4.8 The issue about the relevance of the CMRS certificate has been squarely addressed on prior occasions which warrant no interference as the arbitral tribunal is the sole judge of the quality and quantity of evidence;

4.9 In curative jurisdiction, the Supreme Court is not required to sit over a judgment like a court of appeal. The scope of review jurisdiction is narrow and curative proceedings cannot be treated as a second review;

4.10 Until early March 2023, the trains were running at 90kmph as opposed to the speed of 120kmph at which they ought to have been running and DMRC had been operating AMEL since 01.07.2012 without having paid for its operation for the period between 01.01.2013 till 30.06.2013, except for a small fraction of the amount; and

4.11 The award was made after a meticulous examination of the documentary evidence and it has been two and a half years since the Supreme Court restored the award and thereafter dismissed the review petition on 23.11.2021.

V. Judgment

5.1 In answering the first issue regarding the maintainability of the Curative Petition, the Supreme Court relied on *Rupa Hurra*[6] to delineate the contours of powers to exercise jurisdiction under Article 142 of the Constitution. To entertain a Curative Petition, it ought (i) to prevent abuse of process; and (ii) cure a gross miscarriage of justice. Such circumstances may be a violation of the principles of natural justice or where the Judge fails to disclose his connection with the subject matter, giving scope for an apprehension of bias. Another factor may be in the nature of manifest injustice when the invocation of powers under Article 142 of the Constitution may be warranted.

5.2 Whilst placing reliance on the judgments of the Supreme Court in *Associate Builders*[7] and *Ssangyong Engineering*[8], it was noted that the ground of patent illegality is available when the decision of the arbitrator is found to be perverse or so irrational that no reasonable person would have arrived at it. In the alternative, a finding based on no evidence at all or any award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of patent illegality.

5.3 After delineating the contours of powers under the curative jurisdiction and the ground of patent illegality under Section 34 of the Act, the Supreme Court noted that there is a fundamental error in the manner in which the Supreme Court dealt with the challenge to the decision of the High Court. The Supreme Court re-visited the award and held that the award overlooked the express contractual stipulations which included undertaking effective steps during the cure period by DMRC and thus, the power of termination was not open for DAMEPL.

5.4 It was noted that the fact that defects existed at the end of the cure period relates to only one aspect of the termination clause – that the defects were not *completely* cured. However, the contractual intent was that incremental progress, even if it does not lead to complete cure, is an acceptable course of action to prevent termination. Thus, the interpretation adopted by the Supreme Court in its judgment passed earlier effectively rendered the phrase 'effective steps' otiose.

5.5 Insofar as the issue regarding the binding nature of the CMRS certificate was concerned, the Supreme Court dwelt with the Metro Railways (Operation and Maintenance) Act, 2002 (**'2002 Act'**) and held that the structure and safety of the project, certified by CMRS were relevant, making it a vital piece of evidence. Thus, the Supreme Court noted a fault in the arbitral award as the arbitral tribunal erred in deeming the sanction by CMRS to be irrelevant.

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[6] Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388.
[7] Associate Builders v. DDA, (2015) 3 SCC 49.
[8] Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131.

At this stage, it will be apposite to reproduce the findings of the Supreme Court that are reproduced herein:

> *"**67.** In essence, therefore the award is unreasoned on the above important aspects. It overlooks vital evidence in the form of the joint application of the contesting parties to CMRS and the CMRS certificate. The arbitral tribunal ignored the specific terms of the termination clause. It reached a conclusion which is not possible for any reasonable body of persons to arrive at. The arbitral tribunal erroneously rejected the CMRS sanction as irrelevant. The award bypassed the material on record and failed to reconcile inconsistencies between the factual averments made in the cure notice, which formed the basis of termination on the one hand and the evidence of the successful running of the line on the other. The Division Bench correctly held that the arbitral tribunal ignored vital evidence on the record, resulting in perversity and patent illegality, warranting interference. The conclusions of the Division Bench are, thus, in line with the settled precedent including the decisions in Associate Builders (supra) and Ssangyong (supra)."*

5.6 The Supreme Court noted that the Division Bench of the High Court had applied the correct test in holding that the arbitral award suffered from the vice of perversity and patent illegality. As the Supreme Court had restored the award earlier, under the Curative Petition, it was noted that the earlier decision caused a grave miscarriage of justice warranting the exercise of power under Article 142 of the Constitution. Accordingly, the Supreme Court allowed the Curative Petitions and restored the position as on the date of pronouncement of the judgment of the Division Bench of the High Court. Resultantly, the arbitral award was set-aside and the enforcement proceedings were directed to be discontinued.

5.7 Before parting with the judgment, the Supreme Court noted that the exercise of the curative jurisdiction should not be adopted as a matter of ordinary course and open floodgates of litigation to create a fourth or fifth stage of court intervention.

VI. PSL Opinion

6.1 Under the guise of exercising its inherent powers to do complete justice, the Supreme Court has not only re-visited the findings of the arbitral tribunal but also reappreciated evidence to arrive at an alternative interpretation thereby completely deviating from the fundamental cornerstone of arbitration – *minimal judicial intervention*. In essence, a fifth bite at the same cherry has been welcomed by the Supreme Court that is likely to be calamitous for the arbitration landscape in India.

6.2 A prominent facet, perhaps been overlooked by the Supreme Court while passing this judgment pertains to tinkering with the award passed by a tribunal comprising of engineers and not judicially trained minds. Notably, while passing its earlier judgment by the Supreme Court, the said facet was well considered which appears to now have been set aside without any cogent reasons.

6.3 The Supreme Court seems to have also missed a crucial aspect regarding the delay in filing of the Curative Petition as no reasons have been furnished to justify the delay in preferring

the Curative Petition when the review was dismissed on 23.11.2021. Whilst the Curative Petition is required to be filed within a reasonable period of time, the assessment of the term 'reasonable' ought to have been undertaken by the Supreme Court in the present case.

6.4 Be that as it may, by reappreciating evidence, the Supreme Court has deviated from the well settled principles of law and dissected the arbitral award, akin to the manner in which a first appellate court reviews a judgment passed by a trial court. By overlooking its limited powers under the curative jurisdiction, DMRC's contention regarding miscarriage of justice has been upheld and read into the ground of patent illegality to set aside the arbitral award. Whilst doing so, the Supreme Court has also lost sight of the statutory restriction contained in the *proviso* to Section 34(2A) of the Act that restricts the setting aside of an award merely on the ground of erroneous application of the law or by reappreciation of evidence. Curiously, no reasons have been furnished by the Supreme Court in bypassing such strict rigors of the Act.

6.5 It is imperative to note that the Supreme Court has also not placed adequate fetters whilst passing the judgment in relation to awards passed in India-seated international commercial arbitrations. Due to the absence of such fetters, we may also witness a foreign award under challenge by invoking the curative jurisdiction which is likely to dent investor confidence considering India's endeavours towards becoming an arbitration friendly seat.

6.6 Whilst one school of thought may consider the decision in positive light as sending an alarm to arbitral tribunals to meticulously sift through evidence in infrastructure disputes; the other school of thought is likely to consider the decision as extremely regressive and perhaps an invitation to invoke the curative jurisdiction on regular basis. Be that as it may, despite the word of caution, the present decision is likely to open floodgates and more particularly in cases where the government/ or any of its implementing agencies is a litigant. It is only hoped that the word of caution is read *stricto sensu* and stakeholders are discouraged from invoking the curative jurisdiction on a regular basis.