



Scope Of Supreme Court Of India To Review Arbitral Award Under Curative Petition: Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt Ltd.

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Arbitration # Supreme Court of India # Curative Petition
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The SC established the concept of 'Curative Petition' in 2002 under its inherent powers under Article 129 & Article 142 the Constitution of India ("Col"), through a series of judgments in the case Rupa Ashok Hurra v. Ashok Hurra. It is the ultimate legal resort available to litigants' seeking relief. A curative petition is filed when a review petition is dismissed by circulation, i.e., without an open hearing in the SC. However, a curative petition is allowed only in very exceptional cases where a serious miscarriage of justice has occurred.



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I. Overview

The Supreme Court of India ("SC") in its judgment dated 10th April 2024, in Delhi Metro Rail Corporation Ltd. ("DMRC") v. Delhi Airport Metro Express Pvt. Ltd. ("DAMEPL") [1] exercised its 'curative jurisdiction' and relived the petitioners from a hefty liability by setting aside the Arbitral Award of approximately INR 8000 Crore in favour of the Respondents. In 2008, DMRC and DAMEPL entered into a Concession Agreement, wherein DMRC granted DAMEPL exclusive rights, license, and authority to implement the project of, operating, managing & maintaining Delhi Airport metro rail until August, 2038. In 2012, DAMEPL terminated the Concession Agreement on the ground of failure of DMRC to cure certain defects in the metro rail within the stipulated time period. Thus, DMRC initiated arbitration proceedings.

In May 2017, the arbitral tribunal passed a unanimous award in favour of DAMEPL, which was challenged by DMRC under Section 34 of the Arbitration & Conciliation Act, 1996 ("Arbitration Act") before the Delhi High Court. Initially, a Single-Judge Bench dismissed the Section 34 petition. However upon appeal under Section 37 of the Arbitration Act, Division Bench of the Delhi High Court partly set aside the arbitral award. This led DAMEPL to file a Special Leave Petition in the SC, which was allowed and the arbitral award



was restored. DMRC's review petition was dismissed by the SC, thus, a curative petition was filed by the DMRC. This judgment poses an interesting question on the scope of the jurisdiction of the Supreme Court of India to review an arbitral award under a 'curative petition'.

The SC established the concept of 'Curative Petition' in 2002 under its inherent powers under Article 129 & Article 142 the Constitution of India ("Col"), through a series of judgments in the case *Rupa Ashok Hurra v. Ashok Hurra* [2]. It is the ultimate legal resort available to litigants' seeking relief. A curative petition is filed when a review petition is dismissed by circulation, i.e., without an open hearing in the SC. However, a curative petition is allowed only in very exceptional cases where a serious miscarriage of justice has occurred. The rules and procedure pertaining to the filing of curative petitions have been incorporated in Order XLVIII of the Supreme Court Rules, 2013.

In this article we will discuss whether through this decision, the SC has increased the scope of judicial review of an arbitration award, thereby impacting the effectiveness of the arbitration process.

II. Facts

A. Background

The petitioners, DMRC, a state-owned company, and the respondents, DAMEPL, a private company (a consortium of Reliance Infrastructure Limited and Construcciones Y Auxiliar de Ferrocarriles SA, Spain), entered into a Concession Agreement in 2008 (herein after referred to as "Concession Agreement"). This was a first-of-its-kind public-private partnership, wherein DMRC granted DAMEPL exclusive rights, license, and authority to implement the project of, operating, managing & maintaining a metro rail connectivity between the Railway station and the Airport, along with other points in Delhi, which typically lies within a government's jurisdiction. While DMRC had to look after clearances and bear costs relating to land acquisition, and civil structures; DAMEPL had to design, supply, install, test, operate, and maintain the Airport metro rail until 2038, August.

In 2012, DAMEPL expressed its intention to halt operations, alleging the line was unsafe to operate due to defects attributed to faulty construction & deficient designs, and issued a notice to DMRC to cure these defects. DMRC failed to cure the defects within 90 days of issuing notice and speed restriction sanctions were imposed by the Commissioner of Metro Railway Safety ("CMRS"). DAMEPL alleged that these defects and failure to cure them affected the performance of its obligations under the Concession Agreement which further caused a material adverse effect and hence, terminated the Concession Agreement. DMRC initiated conciliation proceedings, however, it did not succeed, which led DMRC to initiate arbitration proceedings as per the Concession Agreement. In May 2017, a three-member arbitral tribunal passed a unanimous award in favour of DAMEPL, directing DMRC to pay DAMEPL approximately INR 8000 Crore, along with interests, as termination fee and expenses incurred by DAMEPL.

DMRC challenged the award under Section 34 of the Arbitration Act before the Delhi High Court. Initially, a Single-Judge Bench dismissed the Section 34 petition. Upon appeal, a division bench partly allowed the arbitral award. This led DAMEPL to file a Special Leave Petition before the SC, which was allowed and the arbitral award was restored. DMRC's review petition was dismissed by the SC, and thus, DMRC filed a curative petition before the SC.

B. Previous Findings & Decisions

1. Tribunal's Findings (2017)

Defects in Civil Structure: The tribunal found that 72% of the girders were affected by cracks, with uncertain causes and unreliable determinations of crack depth. Additionally, there were twists in about 80 girders and gaps between the shear key and girders, which were not rectified within the cure period. These defects compromised the integrity of the structure.



Material Adverse Effect: The defects in the civil structure were deemed to have a material adverse effect on the performance of DAMEPL's obligations under the Concession Agreement. This breach was attributed to DMRC.

Validity of Termination: The tribunal concluded that since defects remained uncured during the cure period, the termination notice was valid, regardless of the repair costs compared to the project's total cost.

CMRS Certificate: The tribunal held that the CMRS certificate did not validate the defects' cure. The speed restrictions imposed by CMRS were considered to negate the purpose of the high-speed line, making the certificate irrelevant to the termination issue.

2. Single Judge – Delhi High Court

The Single Bench of the High Court upheld the tribunal's findings and the arbitral award:

Validity of Termination: The Single Bench affirmed the tribunal's determination that defects in the civil structure constituted a breach of DMRC's obligations under the Concession Agreement. It upheld the validity of DAMEPL's termination notice, considering the defects' material adverse effect on their performance.

CMRS Certificate: Similar to the tribunal, the Single Bench ruled that the CMRS certificate did not validate the defects' cure. It likely agreed with the tribunal's stance that the CMRS certificate was not relevant to the termination issue, especially considering the speed restrictions imposed by CMRS.

Judicial Review: The Single Bench emphasized that unless the arbitral award was unreasonable or implausible, based on the evidence before the tribunal, there should be no interference. It found the tribunal's detailed analysis and conclusions plausible, indicating that the tribunal had appropriately considered the evidence and arrived at a reasonable decision.

3. Division Bench – Delhi High Court

The Division Bench of the Delhi High Court partially set aside the arbitral award for the following reasons:

Validity of Termination: The Division Bench found ambiguity regarding the relevant date of termination and that the tribunal did not interpret Clause 29.5.1(i) of the Concession Agreement regarding the duration of the cure period. Thus, the termination notice was invalid.

CMRS Certificate: The Division Bench disagreed with the tribunal's treatment of the CMRS certificate as irrelevant to the termination issue. It emphasised the legal effect of the CMRS certificate, which it believed was binding on the tribunal. The Division Bench held that the tribunal's separation of the CMRS certificate issue from the defects and material adverse effects issue was erroneous.

Speed Restrictions: The Division Bench noted that speed restrictions were not explicitly stated as a reason for termination in the cure or termination notices. It found that the tribunal's silence and lack of deliberation on this issue rendered the award inadequate and unreasonable.

4. Special Leave Petition & Review Petition

The Supreme Court, in an appeal to the Division Bench's decision reinstated the arbitral award and came to the following conclusions:

Clarity on Termination Date: The Supreme Court clarified that there was no ambiguity in the termination date. It upheld the tribunal's interpretation and affirmed that the termination was valid, rejecting the Division Bench's concerns regarding the termination notice's effective date and the interpretation of the cure period clause.

Factual Findings: The Supreme Court affirmed the tribunal's factual findings, particularly regarding the existence of defects in the civil structure and their material adverse effect on DAMEPL's obligations under the Concession



Agreement. It upheld the tribunal's conclusion that DMRC had breached its obligations.

CMRS Certificate: The Supreme Court upheld the tribunal's decision regarding the CMRS certificate, agreeing that it did not validate the defects' cure. It affirmed the tribunal's reasoning that the CMRS certification's significance was outweighed by the speed restrictions imposed, which contradicted the purpose of the high-speed line.

Judicial Review: The Supreme Court emphasized the limited scope of judicial review in arbitral awards. It held that the tribunal's decision was based on extensive evidence and expertise, and should not be subjected to extensive scrutiny akin to a court's power to review an order/decision in an appeal.

DMRC's review petition to the SC's decision in the SLP was dismissed on 23rd November 2021.

III. Submissions

A. Petitioners

The defects didn't have a material adverse effect on DAMEPL's obligations under the Concession Agreement, as evidenced by the continuous operation of the metro line.

The termination notice was invalid since DMRC took effective steps to address the defects as per the Metro Railways (Operations & Maintenance) Act, 2002 ("Metro Railways Act 2002").

Termination should have come into effect 90 days after the cure notice plus an additional 90 days, making it effective only on January 7, 2013, when no defects were pending rectification.

The CMRS certification was issued jointly after a thorough inspection, and the CMRS process under the Metro Railways Act 2002 is linked to the provisions of the Concession Agreement.

The Tribunal should have considered the binding effect of the CMRS sanction, and the issue of speed was neither raised nor deliberated before the Tribunal and wasn't relevant to the termination.

The smooth operation of the metro line for 5 and a half years after termination (until the date of award i.e, 2013 to 2017) shows that any defects didn't render it unviable or interfere with DAMEPL's obligations. However, this fact was ignored by the Tribunal making the award perverse & patently illegal.

The Division Bench's interference under Section 37 of the Arbitration Act is justified as the tribunal had ignored vital pieces of evidence. The Supreme Court should not have interfered with the Division Bench's decision under Article 136 of the Indian Constitution.

Under the Metro Railways Act 2002, the Commissioner had final authority to decide on safety of the metro, and CMRS could not be substituted by Tribunal's finding on safety of line.

B. Respondents

1. The curative petition isn't maintainable, as the conclusions arrived at by the Tribunal cannot be revisited.
2. DMRC has operated the project without paying for its operation during a specific period, except for a small fraction of the awarded amount.
3. The trains were running below the required speed till early March 2023.
4. The relevance of the CMRS certificate has been addressed by the Single Judge and the Supreme Court, and the arbitrator is the sole judge of quality & quantity of evidence.
5. The scope of review jurisdiction is narrow which does not warrant rehearing & correction of judgement and this curative proceeding should not serve as a second review for the same.



6. DAMEPL hasn't unjustly enriched itself. DAMEPL completed the project with an investment of Rs. 2802 Crores comprising of debt and equity contributions and it continued to service the debt even after handing over the line to DMRC. DMRC on the other hand, has paid the decretal amount of Rs 2599.18 Crores while Rs 5088 Crores under the decree is outstanding as on 31 January 2024.

IV. Issues

While considering the curative petition, the Supreme Court had to deal with two issues:

1. Whether the curative petition is maintainable?
2. Whether the Supreme Court was justified in restoring the arbitral award that had been set aside by the Division Bench of the High Court on the ground that it suffered from patent illegality?

V. Supreme Court Decision

A. Curative Petition

The Supreme Court established the principles and scope of curative jurisdiction in exercising its inherent powers under Article 142, Col. It emphasises that while the finality of judgments is important, the court's duty to ensure justice overrides this principle in exceptional cases. The SC can entertain curative petitions to prevent abuse of its process and rectify gross miscarriages of justice, even after the dismissal of review petitions. The SC stated examples of situations warranting curative intervention, such as violations of natural justice principles or concerns regarding a judge's impartiality. The SC's jurisdiction is not exhaustively enumerated but extends to situations where there is manifest injustice or where the court acts beyond its jurisdiction, resulting in a grave miscarriage of justice. The SC has laid down certain procedural requirements for entertaining a curative petition, such as a certificate by a Senior Advocate about fulfilling the requirements to prevent frivolous filings [3]. This essentially means that the applicant has to clearly fulfill these conditions for the curative petition to be maintainable and heard by the Supreme Court.

B. Scope of Interference of Courts with Arbitral Awards

The Supreme Court discussed the scope of judicial interference with arbitral awards under Section 34 and 37 of the Arbitration Act. :

Patent Illegality (Section 34(2-A)): Section 34 of the Arbitration Act provides the grounds on which an arbitral award may be set aside. Section 34(2-A) of the Arbitration Act provides an additional ground for setting aside a domestic award if it is vitiated by "patent illegality" appearing on the face of the award. The SC relies upon the decisions of *Associate Builders v. Delhi Development Authority* [4] and *Ssangyong Engineering & Construction Co. Ltd. v. NHA* [5] to under the contours of "patent illegality". Even though interpretation of a contract is exclusively the arbitrator's jurisdiction, patent illegality arises when the arbitrator interprets the contract in a manner that no fair-minded or reasonable person would take. Patent illegality also arises when the findings of the arbitrator are (i) based on no evidence; (ii) based on irrelevant material; (iii) ignores vital evidence; (iv) in breach of the provisions of Arbitration Act, for e.g. an unreasoned award; or (v) in fundamental breach of the principles of natural justice. An award may also be set aside on the ground of patent illegality where the arbitrator's decision is irrational or so unreasonable that no fair-minded person would arrive at the same conclusion, or arbitrator acts beyond his jurisdiction.

Interference by Courts (Section 37): A judgment under Section 34 of the Arbitration Act is appealable under Section 37 of the Arbitration Act under the same grounds of challenge as mentioned under the aforesaid Section 34 [6]. Even though Section 37 is the only appellate remedy available under the Arbitration Act, Article 136 of the Constitution of India allows parties to seek a further Appeal against the decision rendered under Section 37 of the



Arbitration Act in the form of a Special Leave Petition before the SC. When exercising its power under Article 136, the SC must interfere sparingly and only when exceptional circumstances exist, justifying the exercise of the Court's discretion [7]. The SC should limit itself to testing whether the lower court exceeded its jurisdiction under Section 37 of the Arbitration Act or failed to apply the correct tests in assessing the arbitral award.

C. Patent Illegality in the DMRC vs DAMEPL award

The following reasons were cited by the Supreme Court while holding the award patently illegal.

(i) Unreasonable Interpretation of Termination Clause by the Tribunal: Clause 29.5(i) entitles the DAMEPL to terminate the agreement if DMRC "failed to cure such breach or take effective steps for curing such breach" within the cure period. The Tribunal held that since the steps taken did not completely cure the defects, thus "effective steps" were not taken for curing the breach. SC held that the Tribunal failed to explain what constituted "effective steps" and how the steps taken by DMRC were not effective. SC held the failure to differentiate between "curing of defects" and "taking effective steps to cure defects," resulted in Tribunal arriving at an unreasonable interpretation of the termination clause. Further, SC did not consider the relevance of CMRS certificate to determine if "effective steps" were taken during the SLP.

(ii) Overlooking Vital Evidence: The SC criticized the arbitrator for overlooking vital evidence, particularly the CMRS (Commissioner of Metro Railway Safety) certificate in determining whether "effective steps" were taken to cure the defects. The SC also takes note that a Joint Application dated 19th November 2012 was made by both the parties to the Commissioner under the 2002 Act. An Annexure to this Joint Application stated that an independent engineer inspected the repairs and found that the cracks did not impact the integrity of the grinders and there was no cause of concern. This Annexure also mentioned that the train trials conducted after repairs conducted by DMRC were successfully completed at various speeds including a speed of 120 kmph. This Joint Application was made after four months from the date (9 July 2012) on which DAMEPL sent the cure notice, and reflected the change in DAMEPL's stance that the project was not 'safe for operations'. Thus, the Tribunal failed to explain why these steps taken during the cure period were not 'effective steps'.

The SC also noted that the CMRS certificate was also relevant with respect to the cure notice that was premised on safety of operations. The issue of safety of the metro line falls under jurisdiction of the Commissioner under the scheme of the 2002 Act. Thus, the CMRS certificate was vital evidence that goes to the root of the matter for determining the safety of the project and whether effective steps were taken. However, the tribunal ignored this vital evidence and instead focused on the conditions imposed by the Commissioner on speed and regarding inspections.

The arbitral tribunal should have considered the fact that the metro line resumed operation after the DMRC took steps to cure the defects when deciding if 'effective steps' were taken.

(iii) Lack of Reasoning and Explanation: The court observed that the arbitrator's award lacked reasoning and explanation on crucial aspects, such as the effectiveness of steps taken by DMRS and the relevance of CMRS certificates. This lack of reasoning rendered the award arbitrary and irrational, and thus, was patently illegal.

The Supreme Court recognized a miscarriage of justice resulting from its interference with the Division Bench's well-considered decision regarding the arbitral award being perverse and suffering from patent illegality. The SC acknowledged its failure to justify its interference under Article 136, which led to the reinstatement of a patently illegal award burdening a public utility with excessive liability.

Accordingly, the curative petition was allowed, restoring the parties to their post-Division Bench Judgement positions. Execution proceedings enforcing



the arbitral award were discontinued, and amounts deposited by the petitioner were to be refunded. Any coercively collected amounts (which were part of the awarded amount) were to be restored to the petitioner, while orders passed in execution proceedings were set aside.

VI. Analysis and Conclusion

The SC concludes this decision by clarifying that “curative jurisdiction should not be used to open the flood gates and create a fourth or fifth stage of court intervention in an arbitral award”. However, in this decision the SC has widened the scope of patent illegality’. The proviso to Section 34(2-A) of the Arbitration Act specifically prohibits setting aside of the arbitral award ‘on the ground of erroneous application of the law or by reappreciation of evidence’. However, the SC under its curative jurisdiction has increased the scope of Section 34(2-A) under the standard of ‘grave miscarriage of justice’. In the exercise of determining whether vital evidence has been ignored or whether the arbitrator has come to unreasonable interpretation of the Concession Agreement, SC has ended up re-appreciating the evidence and examining the merits and demerits of the case. Thus, in order to restrict judicial interference in arbitral awards it is important to restrict the scope of ‘patent illegality’ under Section 34(2-A) of the Arbitration Act.

India is aiming to be global hub for international commercial arbitration and is also wanting to attract foreign investments into India. For both these goals to be fulfilled, India will have to restrict judicial interference for making the arbitration process independent and efficient. This SC decision could be interpreted in the wrong spirit amongst foreign investors. Arbitration is also used as a tool to off-load the Courts of their heavy caseload. Thus, it is important to restrict the scope of ‘patent illegality’ in order to ensure that this ground is not used to drag the enforcement of the arbitral award and add to the Judiciary’s caseload.

It is also important to note that in many cases arbitrators may be technical experts who may not have an extensive legal background. Their interpretation of contracts and assessment of evidence may diverge from traditional legal reasoning & understanding. This decision makes it important for technical arbitrators to provide a comprehensive reasoning to their findings in the award and consider all the vital evidence. This will ensure that the judiciary cannot interfere with the arbitral award and the award is enforced effectively.

Therefore, while the doctrine of patent illegality may serve as a defense against unjust or irrational awards, it should be applied in exceptional cases. Striking a delicate balance between judicial oversight and arbitrator autonomy is imperative to preserve the efficacy and integrity of arbitration as a dispute resolution mechanism. Moreover, by fostering clearer communication, robust reasoning, and meticulous deliberation in arbitral proceedings, stakeholders of the arbitration can mitigate the risk of awards being set aside on grounds of patent illegality.

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1. Curative Petition No.(C) 108-109 of 2022 in Review Petition(C) Nos. 1158-1159 of 2021 in Civil Appeal No.s 56275628 of 2021, Supreme Court of India, Judgment dated 10th April 2024
2. (2002) 4 SCC 388
3. Supreme Court Rules, 2013 ; Rупpa Hurra vs Ashok Hurra 2002 4 scc 388
4. (2015) 3 SCC 49
5. (2019) 15 SCC 131
6. MMTС Ltd. V. Vendanta Ltd. (2019) 4 SCC 163, para 14;



7. Chandi -Prasad Chokhani v. State of Bihar, AIR 1961 SC 1708; Pritam Singh v. State, 1950 SCC 189.



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