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## **Supreme Court, in exercise of curative jurisdiction, sets aside arbitral award on the grounds of patent illegality and perversity**

A 3 (three) judge bench of the Supreme Court of India ("**Supreme Court**"), while deciding a curative petition<sup>1</sup> filed with regard to the decision in *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.*<sup>2</sup> ("**Curative Petition**"), has set aside an arbitral award on the ground of patent illegality and perversity, recognised as grounds for challenge under Section 34(2A) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

The decision reaffirms the position of law enunciated in *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*<sup>3</sup> and *Associate Builders v. Delhi Development Authority*<sup>4</sup>. It is well settled that an award rendered is perverse or irrational where the findings are: (a) based on no evidence; (b) based on irrelevant material; and (c) award ignores vital evidence. Further, an award is considered patently illegal when the award contains no reasons at all, so as to be considered as a reasoned award.

### **Brief Facts**

The disputes arose from a concession agreement ("**Agreement**") between Delhi Metro Rail Corporation Ltd. ("**DMRC**") and Delhi Airport Metro Express Private Limited ("**DAMEPL**"), for construction, operation and maintenance of Airport Metro Express Line Project ("**AMEL**").

DAMEPL suspended the operation of AMEL in 2012, alleging that it was unsafe to operate, owing to serious design and quality issues.

DAMEPL issued a notice under Clause 29.5.1 of the Agreement requiring DMRC to cure the list of defects within a period of 90 (ninety) days, failing which an event of default would be triggered in terms of the Agreement and entitling DAMEPL to terminate the Agreement. Clause 29.5.1(i) of the Agreement entitled DAMEPL to terminate the Agreement if DMRC failed to cure "*such breach or take effective steps for curing such breach*" within 90 (ninety) days of receipt of notice from DAMEPL.

Thereafter, upon DMRC's alleged failure to cure defects within the 90 (ninety) days period, on October 8, 2012, DAMEPL terminated the Agreement.

On October 23, 2012, DMRC initiated the arbitration proceedings, after exhausting the pre-reference remedies stipulated in the Agreement.

<sup>1</sup> Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd. Curative Petition (C) Nos. 108 -2019 of 2022 in Review Petition (C) No. 1158 – 1159 of 2021 in Civil Appeal Nos. 5627 – 5628 of 2021.

<sup>2</sup> (2022) 1 SCC 131.

<sup>3</sup> (2019) 15 SCC 131.

<sup>4</sup> (2015) 3 SCC 49.

On November 19, 2012, DAMEPL and DMRC made a joint application to the Commissioner of Metro Railway Safety (“**CMRS**”) for re-opening of AMEL. After due inquiry and inspection, the CMRS issued the sanction on January 18, 2013.

Based on the CMRS certification, operations of AMEL were resumed on January 22, 2013. Shortly thereafter, on June 30, 2013, DAMEPL halted operations and handed over assets of AMEL to DMRC.

In August 2013, a 3 (three) member Arbitral Tribunal (“**Tribunal**”) was constituted. The Tribunal passed a unanimous award in favour of DAMEPL (“**Award**”). The Award *inter alia* held that DAMEPL was entitled to: (a) termination payment in terms of the Agreement; (b) expenses incurred in operating the AMEL from January 7, 2013 to June 30, 2013 and debt service made by DAMEPL during this period; (c) refund of bank guarantee, which had been encashed, along with interest thereon; (iv) refund of security deposits with service providers along with interest thereon. It was also held that DMRC was entitled to concession fee for the period from February 23, 2012, to January 7, 2013.

The Award was based on the following findings: (a) the termination notice issued by DAMEPL was valid; (b) DMRC had failed to cure the breach within 90 (ninety) days, nor had effective steps been taken to cure such defects; and (c) this resulted in a material adverse effect on the concessionaire.

Assailing the Award, DMRC filed a challenge petition under Section 34 of the Arbitration Act. The said petition was dismissed by a Single Judge of the Delhi High Court. It was held that so long as the Award was reasonable and plausible, considering the material before the Tribunal, no interference was warranted, even if an alternative view was possible.

This gave rise to an appeal under Section 37 of the Arbitration Act before a Division Bench of the Delhi High Court (“**Division Bench**”). The Division Bench set aside the Award on the grounds of perversity and patent illegality.

Against the decision of the Division Bench, DAMEPL filed a Special Leave Petition (“**SLP**”) under Article 136 of the Constitution. A 2 (two) judge bench of the Supreme Court allowed the SLP and restored the Award. The review petition assailing this decision was dismissed. DMRC then filed a curative petition.

## Issues before Supreme Court in the Curative Petition

The issues considered by the Supreme Court in the Curative Petition included: (a) whether the curative petition was maintainable; and (b) whether the 2 (two) judge bench of the Supreme Court was justified in restoring the Award, which had been set aside by the Division Bench on the grounds that it suffered from patent illegality.

## Supreme Court’s Decision

The decision of the Supreme Court on both the primary issues was interlinked.

On the first issue, it was held that in essence, the jurisdiction of the Supreme Court, while deciding a curative petition, extended to cases where the court had acted beyond its jurisdiction, resulting in a grave miscarriage of justice.

The Supreme Court, thereafter, examined the scope of interference with arbitral awards under Section 34 of the Arbitration Act. In this regard, it was held that although the interpretation of a contract was exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, was impermissible, and would result in the award suffering from the vice of patent illegality.

On the second issue, the Supreme Court concluded that the 2 (two) judge bench of the Supreme Court erred in interfering with the decision of the Division Bench. While holding so, the Supreme Court concluded that the decision of the Division Bench was based on a correct application of the test under Section 34 of the Arbitration Act.

It was further held that the decision of the Division Bench provided adequate reasons to come to the conclusion that the Award suffered from perversity and patent illegality *inter alia*: (a) the Award overlooked crucial facts and evidence on record that were crucial to the determination of the issues before the Tribunal, particularly the CMRS certificate which had led to resumption of the AMEL services, although all defects had not been cured; (b) the Award overlooked the express terms of the terms of the Agreement i.e., Clause 29.5.1(i) which stipulated that “*if effective steps*” were taken during the cure period by DMRC, the contractual power to terminate the Agreement, could not be exercised.

In view of the foregoing, the Supreme Court held that the decision of Division Bench of the Delhi HC was in line with the settled precedent including *Ssangyong (supra)* and *Associate Builders (supra)* and that the Division Bench had correctly held that the Tribunal ignored vital evidence on record, resulting in perversity and patent illegality, warranting interference. It was further held that “*by setting aside the judgement of the Division Bench, this Court restored a patently illegal award which saddled a public utility with an exorbitant liability. This has caused a grave miscarriage of justice.*”

Accordingly, the Supreme Court held that the facts of the case warranted exercise of the curative jurisdiction of the Supreme Court, in terms of the judgment in *Rupa Hurra v. Ashok Hurra*<sup>5</sup>, and set aside the Award.

The Supreme Court did, however, caution that the curative jurisdiction should not be used to open the floodgates and create a fourth or fifth stage of court intervention in an arbitral award.

## Conclusion

On the face of it, the decision of the Supreme Court may be said to be in consonance with the law laid down and the position of law enunciated in the *Ssangyong (supra)* and *Associate Builders (supra)* decisions. However, the setting aside of the Award, that too in exercise of curative jurisdiction, appears to be contrary to the principles of minimal judicial intervention under the Arbitration Act. The fact that the Supreme Court has effectively reappreciated the evidence on record and has examined the interpretation of the terms of the Agreement between the parties, both of which are ordinarily within the domain of the tribunal, leads to the concern that floodgates will be opened for another layer of judicial scrutiny of arbitral awards, notwithstanding the words of caution in this regard in the judgment. The judgment also begs the question whether curative jurisdiction would have been exercised with respect to an arbitral award if a public utility was not a party to the proceedings.

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<sup>5</sup> 2022 4 SCC 388.

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