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**Deciphering the Supreme Court's Verdict on
DMRC v. DAMEPL – The "*Cure*" to Longstanding Legal
Battle**



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Deciphering the Supreme Court's Verdict on DMRC v. DAMEPL — The “Cure” to Longstanding Legal Battle

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Published on May 6, 2024 - By Bhumika Indulia



In a recent development, the Supreme Court of India rendered a significant ruling in the prolonged legal battle between the Delhi Metro Rail Corporation and the Delhi Airport Metro Express Private Limited. The dispute originated from disagreements over the termination of a concession agreement for the Airport Metro Express Line Project and has been through a complex legal journey. This article examines the Supreme Court's verdict on the curative petition in *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express (P) Ltd.*¹

A. Brief facts

Delhi Metro Rail Corporation (DMRC), the petitioner, is a State-owned enterprise wholly owned by the Government of India and the Government of National Capital Territory of Delhi. Delhi Airport Metro Express Private Limited (DAMEPL), the respondent, is a special-purpose vehicle incorporated by a consortium comprising of Reliance Infrastructure Limited and Construcciones Y Auxiliar de Ferrocarriles SA, Spain.

In 2008, the consortium was awarded a contract (concession agreement) for the design, construction, commissioning, operation, and maintenance of what is known as the Airport Metro Express Line Project (Project) in New Delhi. The concession agreement entered amongst the parties envisaged a public-private partnership for providing metro rail connectivity between New Delhi Railway Station and the Indira Gandhi International

Airport, amongst other locations within Delhi.

In terms of the concession agreement, DAMEPL was exclusively authorised with all requisite rights to implement the works pertaining to the project, and among these exclusive rights included the right to manage and operate the project as a commercial enterprise. DMRC was responsible for, amongst other things, procuring the necessary government clearances and approvals, as well as bearing the costs associated with civil works and land acquisition. DAMEPL, on the other hand, was responsible for the design, installation, testing, and commissioning of various systems like rolling stock, power supply, overhead equipment, signalling, track system, platform, screen doors, ventilation, and other architectural aspects.

Under the concession agreement, DAMEPL was obligated to complete the project within two years, followed by the maintenance of the project until August 2038. However, due to delays, extensions were granted periodically. Eventually, safety clearances were secured, leading to the commencement of commercial operations in February 2011.

In March 2012, DAMEPL invited DMRC to undertake a joint inspection of the viaduct and its bearings before the expiry of the defect liability period of the civil contractors. In April 2012, DAMEPL requested DMRC to consider deferring the payment of the concession fee on account of the intervening delay in the handover of the stations by DMRC. As per DAMEPL, although the project had been operational and glitch free since February 2011, the retail activity did not pick pace. In this regard, DAMEPL urged DMRC to extend its support for what was a first-of-its-kind public-private partnership.

In May 2012, DAMEPL complained about issues relating to the installation of viaduct bearings. In this regard, DAMEPL alleged that there were noticeable deformities and cracks at several locations. In its response, DMRC informed DAMEPL in June 2012 that, pursuant to its inspections, no bearings were found to be damaged. However, DMRC did admit that grouting material filled above or below the bearings was damaged/loosened, which would be put to repair on priority. On account of the same, DMRC advised DAMEPL to enforce speed restrictions as deemed necessary in the interest of safety.

In July 2012, the Ministry of Urban Development held a meeting among the relevant stakeholders. Following this, a Joint Inspection Committee was established to investigate the complaints raised by DAMEPL on alleged defects within the civil works undertaken for the project.

During this period, DAMEPL reiterated its concerns and expressed its intention to stop the operations of the project due to safety concerns. Consequently, the operations of the project were halted in July 2012. A notice was then issued by DAMEPL on 9-7-2012 setting out a list of non-exhaustive defects and asking DMRC to cure them within a period of 90 days. The notice stated that the defects were attributable to faulty construction and

deficient designs, which affected the -project's safety. DAMEPL asserted that these defects constituted a "material adverse effect", hindering its ability to fulfil contractual obligations, thus justifying termination of the concession agreement.

In October 2012, DAMEPL formally terminated the concession agreement, citing DMRC's failure to rectify defects within the stipulated 90-day period. Subsequently, DMRC initiated arbitral proceedings. In November 2012, at the joint request of the parties, the Commissioner of Metro Railway Safety (CMRS) conducted its inspection and issued a sanction sometime in January 2013, allowing the project to operate albeit with certain safety and speed restrictions.

Following CMRS's grant of approval subject to the safety and speed restrictions, DAMEPL resumed the project's operations in January 2013. However, citing persistent safety concerns and ongoing disputes, DAMEPL handed over the project to DMRC in June 2013. From July 2013 onwards, DMRC assumed responsibility for the project's operations.

A. Arbitration and prior rounds of litigation

In August 2013, a three-member Arbitral Tribunal was constituted which rendered its unanimous award in May 2017 (arbitral award). In terms of the arbitral award, it was held that DAMEPL was entitled to (i) a termination payment of Rs 2782.33 crores plus interest in terms of the concession agreement; (ii) the expenses incurred in operating project from January 2013 to June 2013 and debt service made by DAMEPL during this period of Rs 147.52 crores plus interest; and (iii) refund of the bank guarantee amounting to Rs 62.07 crores plus interest; (iv) security deposits with the service providers, amounting to Rs 56.8 lakhs plus interest. Further, the arbitral award also provided that DMRC was entitled to Rs 46.04 crores as a concession fee for the period from February 2012 to January 2013.

Aggrieved by the arbitral award, DMRC instituted an application under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) before the Delhi High Court (High Court). The Single Judge of the High Court dismissed the petition. This gave rise to an appeal under Section 37 before a Division Bench of the High Court. The appeal was partly allowed and the arbitral award was set aside. Against the decision of the Division Bench of the High Court, DAMEPL moved a special leave petition under Article 136 of the Constitution of India. A twoâ€Judge Bench of the Supreme Court allowed the appeal and restored the arbitral award. A review petition² assailing this decision filed by DMRC was dismissed. Thus, a curative petition came to be filed.

A. Proceedings before the Arbitral Tribunal

During the arbitration proceedings, DMRC defended itself by asserting that:

- (i) It promptly addressed the identified defects upon receiving the notice, which involved consulting the original design consultant and organising meetings with the

Ministry of Urban Development. As per DMRC, DAMEPL was actively engaged in these efforts.

- (ii) The termination notice was actually prompted by DAMEPL's own financial difficulties and the notion that the project was no longer financially feasible.

Based on these arguments, DMRC sought the cancellation of the termination notice and urged DAMEPL to resume fulfilling its obligations under the concession agreement.

On the contrary, DAMEPL asserted that defects arose due to DMRC's flawed design, and these issues were not rectified within the 90-day cure period. Furthermore, DAMEPL contended that no effective measures were taken to address these defects, leading to significant negative repercussions. Consequently, DAMEPL argued that terminating the concession agreement was justified on account of the happening of a material adverse event.

The Arbitral Tribunal examined the defects in the structure and whether they had been cured or if effective steps had been taken to remedy the defects within the cure period. It was noted that more than 70% of the girders were affected by cracks, and the cause of the cracks was uncertain. As per the Arbitral Tribunal, the depth of the cracks was not reliably determined and the inspection for repairs carried out at the instance of DMRC was "non-serious". Further, the Arbitral Tribunal noted that there were twists in about 80 girders and gaps between the shear key and the girders, which DMRC did not cure during the cure period. Collectively, these defects were deemed to have undermined the structural integrity of the project. As a result, the Arbitral Tribunal concluded that DMRC fell in breach of its contractual obligations outlined in the concession agreement, leading to significant negative consequences for the concessionaire.

The Arbitral Tribunal additionally determined that CMRS' approval to operate the project was conditioned upon the stringent monitoring of the project's operations and adherence to the imposed speed limitations. Given that the project was intended for high-speed travel, the Tribunal concluded that these speed restrictions hindered its intended purpose. Consequently, the Tribunal deemed the issuance of a certificate by the CMRS or the subsequent operation of the line irrelevant in addressing the pertinent issues at hand.

A. Decisions of the High Court

The Single Judge of the High Court, presiding over the challenge to the arbitral award pursuant to Section 34 of the Arbitration Act, upheld³ the award. The Single Judge remarked that as long as the arbitral award remained reasonable and plausible, no intervention was justified, even if an alternative perspective existed. It was concluded that the Tribunal in this case had examined the material and evidence leading to a reasonable conclusion.

However, the Division Bench of the High Court, exercising its powers under Section 37 of the Arbitration Act, partially set aside⁴ the arbitral award, deeming it perverse and blatantly illegal. This decision was based on the following grounds:

- (i) On the validity of the termination, *ex facie*, the termination which was effective immediately from the date of termination was held to be invalid.
- (ii) The correspondence of DAMEPL did not rely on the CMRS' speed and safety restrictions as the reason for termination, and the Arbitral Tribunal did not deliberate on this aspect either, leaving the arbitral award silent and lacking reasoning on this matter.
- (iii) Stressing on the importance of CMRS' sanction under the Metro Railways (Operation and Maintenance) Act, 2002, the Arbitral Tribunal's findings were deemed incorrect because firstly, the Arbitral Tribunal overlooked the legal effect of the CMRS certificate, which was binding; and secondly, the Arbitral Tribunal incorrectly separated the issue of defects and material adverse effects from the CMRS certificate's relevance to the termination's validity.

A. Judgment of Supreme Court in appeal

The Supreme Court set aside the decision of the Division Bench and restored the arbitral award on the following grounds:

- (i) There was no ambiguity in the date of termination and even if a different view from that of the Tribunal were possible, construction of the provisions of the contract was within the exclusive domain of the Tribunal.
- (ii) The arbitral award was not unreasonable. The Tribunal's conclusion that the defects remained uncured was a factual determination, not subject to challenge.
- (iii) DMRC had not contended before the Tribunal that CMRS' certificate was binding and conclusive of the fact that the defects were cured or that effective steps had been taken in that regard.
- (iv) The Division Bench of the High Court was in error in holding that the issue of the CMRS certificate was wrongly separated from the issue of defects. It held that dealing with the certificate separately from the validity of termination did not render the Tribunal's findings on the latter erroneous. The Tribunal comprised of engineers and the arbitral award could not be scrutinised in the same manner as an arbitral award drawn by a legally trained mind.

The review petition of DMRC against the above judgment of the Supreme Court was dismissed in November 2021.

A. Issues in the curative petition

The moot questions that arose for the consideration of the Supreme Court are: (i) whether the curative petition is maintainable in the facts and circumstances of the case;

and (ii) whether the Supreme Court was justified in restoring the arbitral award which had been set aside by the Division Bench of the High Court on the ground that it suffered from patently illegality.

A. Findings of the Supreme Court

(i) Invocation of curative jurisdiction — Basis and principles

The Supreme Court observed that the Constitution Bench decision in *Rupa Hurra v. Ashok Hurra*⁵ had conclusively dealt with the issue as to whether any relief is available against a final judgment of the Supreme Court after the dismissal of a petition seeking review of a judgment. In this regard, in *Rupa Hurra*⁶, it was clarified that the concern of the Court for rendering justice in a cause cannot be considered less important than the principle of finality. There are certain situations, which would require reconsideration of a final judgment even after the review has been dismissed to set right a miscarriage of justice. Such circumstances are those where declining to reconsider a judgment would be oppressive to judicial conscience and cause perpetuation of irremediable injustice.

While delineating the principles of entertaining a curative petition, the Supreme Court in *Rupa Hurra*⁷ observed that the Supreme Court may entertain a curative petition to (i) prevent abuse of its process; and (ii) to cure gross miscarriage of justice. The Supreme Court clarified that it was a common ground that except when very strong reasons exist, the Supreme Court should not entertain an application seeking reconsideration of an order which has otherwise become final on dismissal of a review petition. Speaking of the grounds on which a curative petition may be allowed, the Supreme Court observed that “it is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained”.

In addition to the above, the Supreme Court laid certain procedural requirements for entertaining a curative petition, such as issuance of a certificate by a Senior Advocate about the fulfilment of the requirements warranting the filing of a curative petition. In a concurring view taken by one of Judges of the Constitution Bench in *Rupa Hurra*⁸, the test of “manifest injustice” was also propounded. In essence, a curative petition could be entertained in the rarest of rare cases where a prima facie case was made out of grave miscarriage of justice.

(ii) Limited scope of interference of courts with arbitral awards

The Supreme Court referred to Section 34 of the Arbitration Act which sets out the grounds for setting aside an arbitral award. One such ground is contained in Section 34(2-A) which empowers the competent court to set aside an arbitral award when it is found that the same is vitiated by “patent illegality” appearing on the face of the arbitral award.

The Supreme Court then referred to its two-Judge Bench decision in *Associate Builders v. DDA*⁹ to reiterate that “although the interpretation of a contract is exclusively within the

domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible". A patent illegality would arise when the Arbitral Tribunal adopts a view which is not a possible view i.e. a view which no reasonable person could possibly have taken. A patent illegality may also arise when the award falls in teeth of the substantive provisions of Indian law or suffers from the vice of breaching principles of natural justice. The Supreme Court further reiterated that decision of the Arbitral Tribunal must not be perverse or irrational i.e. one where the findings are (i) based on no evidence; (ii) based on irrelevant material, and (iii) ignores vital evidence.

The Supreme Court then referred to the decision in *Ssangyong Engg. & Construction Co. Ltd. v. NHA*¹⁰ which reiterated the law laid in *Associate Builders case*¹¹.

Speaking of the jurisdiction of courts under Section 37 of the Arbitration Act, the Supreme Court observed that a judgment setting aside or refusing to set aside an arbitral award under Section 34 was appealable under Section 37 of the Arbitration Act. It was further held that a line of judicial precedents had established that the jurisdiction under Section 37 is akin to the jurisdiction of the Court under Section 34 and restricted to the same grounds of challenge as Section 34 of the Arbitration Act.¹²

While in the statutory scheme of the Arbitration Act, a recourse to Section 37 was the only appellate remedy available,¹³ the Supreme Court observed that the Constitution of India provided parties with yet another remedy under Article 136 of the Constitution of India. In the words of the Supreme Court, the remedy under Article 136 "is the discretionary and exceptional jurisdiction" of the Supreme Court to grant special leave to appeal.

Reiterating the limited scope of interference and the discretionary nature of the jurisdiction under Article 136 of the Constitution of India, the Supreme Court held that interference must be done sparingly and only when exceptional circumstances exist justifying the exercise of the Supreme Court's discretion.¹⁴

(iii) Patent illegality in the arbitral award in the present case

(a) The Arbitral Tribunal failed to explain what constituted "effective step for curing the breach"

In terms of the concession agreement, DAMEPL was entitled to terminate the concession agreement if DMRC "failed to cure breach" or "take effective steps to cure the breach" within the cure period.

The Supreme Court observed that the Arbitral Tribunal's findings suggested that the existence of certain defects after the cure period implied that the defects were not rectified, and no effective measures were taken for curing the defects. However, the Supreme Court opined that the presence of defects at the end of the cure period addressed only one aspect of the termination clause — the incomplete rectification of defects. It still did not clarify whether effective steps were initiated within the cure period.

Essentially, the Arbitral Tribunal viewed ongoing actions of DMRC that had not yet resulted in fully rectified defects as not constituting “effective steps” to prevent termination. This approach equated the completion of defect rectification with the effectiveness of the steps taken, disregarding the distinction between “curing defects” and “taking effective steps to cure defects”.

As per the Supreme Court, the above interpretation did not align with the parties’ intentions as expressed in the inclusion of the phrase “effective steps” in the concession agreement. The intent of the parties was evidently to afford each other the opportunity to either rectify defects or initiate effective measures, even if those measures did not completely remove the defects within the cure period. The Supreme Court then observed that going by the terms of the concession agreement, incremental progress, even if it did not lead to complete curing of defects is an acceptable course of action to prevent termination.

It was also noted that while the Arbitral Tribunal could have concluded that the steps taken by DMRC during the cure period were ineffective within the relevant clause’s meaning. However, such discussion and reasoning were conspicuously absent.

(b) The arbitral award overlooked vital evidence and matters on the record

In view of the above findings, the Supreme Court opined that the Arbitral Tribunal failed to take note of vital evidence and record to decide on the issue of validity of the termination. The Arbitral Tribunal wrongly observed that the imposition of conditions of inspection and speed/safety restrictions by CMRS meant that the defects were not fully cured. In this regard, the Supreme Court observed as below:

56. Certainly, the imposition of conditions shows that the defects were not cured completely, to warrant an unconditional sanction for full speed operations. However, as the Division Bench of the High Court correctly observed, the separation of the validity of termination and relevance of the CMRS certificate was the reason for this erroneous finding. Since the “effective steps” aspect was overlooked, the CMRS certificate was erroneously deemed to be irrelevant.¹⁵

In the present case, it was an admitted position that DMRC did cure some of the defects in entirety and steps were taken to cure the remainder of the defects. In fact, upon the completion of the repairs by DMRC, all systems within project were checked for correct functioning and the metro trains were run at high speeds.

As per the Supreme Court, instead of considering the crucial evidence presented in form of the CMRS certificate regarding safety and effective measures, the Arbitral Tribunal focused solely on the conditions imposed by CMRS regarding speed and inspections. The arbitral award failed to explain why DMRC’s actions were not considered “effective steps” within termination clause’s meaning. The Supreme Court observed that the arbitral award lacks reasoning on these critical aspects.

(iv) Conclusion of the Supreme Court

The Supreme Court opined that the interference of the two-Judge Bench of the Supreme Court with the decision of the Division Bench of the High Court had resulted in a miscarriage of justice. The Division Bench of the High Court applied the correct test in holding that the arbitral award suffered from the vice of perversity and patent illegality. Further, the Supreme Court opined that the findings of the Division Bench of the High Court were borne out from the record and were not based on a misappreciation of law or fact.

By setting aside the judgment of the Division Bench of the High Court, the two-Judge Bench of the Supreme Court restored a patently illegal award which saddled a public utility with an exorbitant liability. This has caused a grave miscarriage of justice, which warranted the exercise of the power under Article 142 of the Constitution of India in a curative petition, in terms of *Rupa Hurra*¹⁶.

In view of the above, the curative petitions were allowed, and the parties were restored to the position in which they were on the pronouncement of the judgment by the Division Bench of the High Court. Towards the end its judgment, the Supreme Court observed as below:

70. Before concluding, we clarify that the exercise of the curative jurisdiction of this Court should not be adopted as a matter of ordinary course. 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, under this Court's review jurisdiction or curative jurisdiction, respectively.¹⁷

A. Authors' comments

The Supreme Court's decision in this case holds profound implications on multiple fronts. Firstly, it arrives at a pivotal moment for DMRC, which had been grappling with financial pressures exacerbated by the intervening pandemic. With the amounts awarded under the arbitral award coupled with the interest rising up to a staggering Rs 8000 crores, the prospect of upholding the arbitral award posed a significant threat to DMRC's financial stability. An adverse ruling could have potentially pushed the organisation to the brink aggravating its already precarious financial situation. Secondly, the decision to entertain a curative petition in itself is extraordinary. The Supreme Court guided by the dictum in *Rupa Hurra*¹⁸ has historically shown great reluctance in revisiting, let alone overturning its own judgments in exercise of the curative jurisdiction, reserving such action in exceptional cases where a clear miscarriage of justice is evident.

By effectively overturning the arbitral award through a curative petition, the Supreme Court has deviated from the norm. However, it is crucial to note that such interventions should not set a precedent for routine practice. As emphasised by the Supreme Court itself, the curative jurisdiction should be sparingly exercised and must not open the

floodgates or create a fourth or fifth stage of court intervention. Further, any court intervention with arbitral process or decisions must be confined within the established legal framework outlined in the Arbitration and Conciliation Act, 1996.

The Supreme Court's cautionary statement highlights the need for a balanced approach in Indian arbitral jurisprudence. While ensuring the integrity of the arbitral process is paramount, undue interference risks undermining the efficiency and efficacy of the arbitration as an alternative mode of dispute resolution. Therefore, it is essential to tread carefully, avoiding unnecessary disruptions that could impede the much-desired advancement of Indian arbitration jurisprudence.

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1. 2024 SCC OnLine SC 522.
2. 2024 SCC OnLine SC 522.
3. Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited, 2018 SCC OnLine Del 7549
4. DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562.
5. (2002) 4 SCC 388.
6. (2002) 4 SCC 388.
7. (2002) 4 SCC 388.
8. (2002) 4 SCC 388.
9. (2015) 3 SCC 49.
10. (2019) 15 SCC 131.
11. (2015) 3 SCC 49.
12. *MMTC Ltd. v. Vedanta Ltd.*, (2019) 4 SCC 163; *Konkan Railway Corpn. Ltd. v. Chenab Bridge Project Undertaking*, (2023) 9 SCC 85
13. Arbitration and Conciliation Act, 1996, S. 37(3) expressly clarifies that no second appeal shall lie from an order passed under Section 37, but nothing in the section takes away the constitutional right under Art. 136.
14. *Chandi Prasad Chokhani v. State of Bihar*, 1961 SCC OnLine SC 165; *Pritam Singh v. State*, 1950 SCC 189.
15. *DMRC Ltd. case*, 2024 SCC OnLine SC 522.
16. (2002) 4 SCC 388.
17. *DMRC Ltd. case*, 2024 SCC OnLine SC 522.

18. (2002) 4 SCC 388.