
FINALITY VERSUS JUSTICE: A CRITICAL CASE OF CURATIVE PETITION IN DELHI METRO RAIL CORPORATION (2024)

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INTRODUCTION:

The Supreme Court of India has always been hailed as the ‘guardian of the Indian Constitution,’ upholding, and protecting the ‘fundamental rights’ of the citizens, by devising various instruments of judicial decision making by invoking its powers under Art.142 including the idea of ‘Curative Writs.’¹The concept of Curative Petition, was devised by the Supreme Court in the landmark case of ‘*Rupa Ashok Hurra v Ashok Hurra*.’²However, the said jurisdiction of the court has been highly contested in the recent past owing to its judgments in the ‘*M/s. Bhaskar Raju v. M/s. Dharmaratnakara Rai Bhadur*’³ and, ‘*Delhi Metro Rail Corporation v. Delhi Airport Metro Express Private Limited*’ (“DMRC v. DAMEPL”).⁴ Therefore, an individual can conclude safely that Curative jurisdiction of the court also applies to arbitrations or arbitral proceedings.

Many jurists and proponents of the curative jurisdiction argue that the method is evolved to rectify the errors committed during judicial decision making by the Supreme Court causing grave injustice and thus must be exercised in ‘rarest of rare cases. Whereas, the antagonist argues that invocation of the jurisdiction increases a forum of appeal, thus delaying the finality to a dispute causing hardship to both the parties.’⁵

Recently, the Supreme Court exercised its powers of curative review in the case of DMRC v DAMEPL⁶, whereby the court allowed the curative petition filed by Delhi Metro Rail Corporation (“DMRC”) against the judgment and final order of the Supreme Court in the case

¹ INDIA CONST. art. 142.

² *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388 (SC).

³ *M/s. Bhaskar Raju v. M/s. Dharmaratnakara Rai Bhadur*, (2020) 4 SCC 612 (SC).

⁴ *Delhi Metro Rail Corporation v. Delhi Airport Metro Express Private Limited*, 2024 SCC OnLine SC 522 (SC).

⁵ INDIA CONST. art. 145.

⁶ *Supra* n. 4.

of *'Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation'*⁷ ("DAMEPL v. DMRC").

The author in the present article seeks to critically analyse the judgment of the Supreme Court delivered in exercise of its curative powers in the case of *'Delhi Metro Rail Corporation v. Delhi Airport Metro Express Private Limited'*, and identify the future ramifications of such judgments on the arbitration proceedings in India considering the principle of minimal court interference in arbitration and arbitral proceedings.

INDIAN CONSTITUTION: THE IDEA OF A CURATIVE PETITION

In terms of the Indian Constitution, the Supreme Court of India is the final court of appeal and therefore, some finality must be provided to its judgments, this principle is reflected in the rules framed by the Supreme Court under Art.145 of the Indian Constitution. O.XII Rule 3 of the Supreme Court Rules, 2013, states that, *'subject to the provision contained in O.XLVII of these rules, a judgment pronounced by the Court or by majority of the Court or by a dissenting Judge in open Court shall not afterwards be altered or added to, save for the purpose of correcting a clerical or arithmetical mistake or an error arising from any accidental slip or omission'*.

From the above discussion, 'it appears that a judgment of the Court can be altered only in two situations i.e., *firstly*, an error due to some clerical mistake and *secondly*, under O.XLVII of the rules.'⁸ "O.XLVII of the Rules, 2013, deals with Review Petition, whereby Rule 1 of O.XLVII states that the Court may review its judgment or order, provided that in a civil proceeding the review may be on the grounds as mentioned in 'O.XLVII of the Code of Civil Procedure, 1908 i.e., mistake in the judgment, discovery of new evidence and other relevant and sufficient reasons,'⁹ and 'in case of criminal proceedings, the review may be on the grounds of *prima facie* error in record'¹⁰."¹¹ The Hon'ble Supreme Court further clarified the threshold of review in the case of *Kantaru v Indian Young Lawyer Association*¹², by observing that review in civil and criminal proceedings cannot apply to writ petitions.

⁷ Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation, 2021 SCC OnLine SC 3613 (SC).

⁸ Gautam Bhatia, *A Reference Order in a Curative Petition – Setting a Wrong Precedent?*, Available at: <https://indconlawphil.wordpress.com/tag/curative-petitions/> (last accessed: May 19, 2024)

⁹ Rule 1 of Order XLVII of Code of Civil Procedure, 1908.

¹⁰ Rule 1 of Order XLVII of Supreme Court Rules, 2013.

¹¹ *Supra* n. 8.

¹² *Kantaru Rajeevaru v. Indian Young Lawyers Association*, (2020) 2 SCC 1 (SC).

However, ‘time and again after the dismissal of review petitions, the aggrieved party has filed Writ Petitions under Art.32 of the Indian Constitution, whereby the Supreme Court has rectified the shortcomings.’¹³ ‘However, in such cases, the Writ Jurisdiction of the Supreme Court was not well adapted due to the reasons that: *firstly*, the Supreme Court does not fall within the definition of State under Art.12 of the Indian Constitution, and *secondly*, it was impermissible for one bench of the Supreme Court to issue a writ of certiorari against the Judgment and Final Order of another bench.’¹⁴

Accordingly, the Supreme Court in 2002, devised a remedy known as ‘Curative Petition’ in the case of ‘*Rupa Ashok Hurra v. Ashok Hurra*’¹⁵, using its inherent powers enshrined under Art. 129 read with Art.142 of the Indian Constitution. The Hon’ble Court observed as follows:

“50. The next step is to specify the requirements to entertain such a curative petition under the inherent power of this Court so that floodgates are not opened for filing a second review petition as a matter of course in the guise of a curative petition under inherent power. It is common ground that except when very strong reasons exist, the Court should not entertain an application seeking reconsideration of an order of this Court which has become final on dismissal of a review petition. It is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained.

51. Nevertheless, we think that a petitioner is entitled to relief ex debito justitiae if he establishes (1) violation of the principles of natural justice in that he was not a party to the lis but the judgment adversely affected his interests or, if he was a party to the lis, he was not served with notice of the proceedings and the matter proceeded as if he had notice, and (2) where in the proceedings a learned Judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.

53. We are of the view that since the matter relates to re-examination of a final judgment of this Court, though on limited ground, the curative petition

¹³ *Supra* n. 2.

¹⁴ *Supra* n. 8.

¹⁵ *Supra* n. 2.

must be first circulated to a Bench of the three seniormost Judges and the Judges who passed the judgment complained of, if available. It is only when most of the learned Judges on this Bench conclude that the matter needs hearing that it should be listed before the same Bench (as far as possible) which may pass appropriate orders."

Thus, from the above the intention of the Supreme Court was to use the remedy in a sparing manner and only in rarest of rare cases. Further, on a closer perusal of Rule 1 of Order XLVII of SC Rules, 2013, it is amply clear that the judgment in Rupa Ashok Hurra must be applied in a stricter sense, without providing a liberal interpretation to its application.

DMRC V. DAMEPL: A CURATIVE EXERCISE BY THE SUPREME COURT?

In the year 2008, 'a concession agreement was entered into between DMRC and special purpose vehicle 'DAMEPL', incorporated jointly by Reliance Infrastructure Limited and *Construcciones Y Auxiliar de Ferrocarriles SA*, Spain, whereby DAMEPL was responsible for the construction, operation, maintenance of the Delhi Airport Metro Express Limited.'¹⁶ The agreement established a 'public-private partnership for functioning of metro services between the New Delhi Railway Station and Indira Gandhi International Airport.' Subsequently, a dispute arose between the parties owing to deferment of the concession fee due to delays in providing access to the stations by the DMRC.

Accordingly, 'DMRC initiated arbitration proceedings in 2012 under the concession agreement, whereby DAMEPL halted operations and handed over the line to DMRC.' The "Arbitral Tribunal vide its final order and arbitral award dated 11.05.2017, ruled unanimously in favour of DAMEPL. The Arbitral Award observed following:

- (a) DAMEPL was entitled to Rs. 2782.33 cr. in addition to interest in terms of the concession agreement dated 2008;
- (b) DAMEPL was awarded Rs. 147.52 Crores in addition to interest for the expenses incurred for operating AMEL during the period 07.01.2013 to 30.06.2013;

¹⁶ Ishwar Ahuja et.al., *Recent Strides in Curative Jurisdiction of the Supreme Court*, Available at: <https://www.barandbench.com/law-firms/view-point/recent-strides-curative-jurisdiction-supreme-court> (last accessed on May 19, 2024).

- (c) DAMEPL was awarded Rs. 67.07 Crores in addition to interest at the rate of 11% p.a. for the return of bank guarantee;
- (d) DAMEPL was awarded Rs. 56.8 Lakhs in addition to interest at the rate of 11% p.a. for security deposits with the service providers;
- (e) DMRC was entitled to recover Rs. 46.04 Crores as concession fee for the period from 23.02.2012 to 07.01.2013.”

Aggrieved by the ‘Arbitral award dated 11.05.2017, Delhi Metro Rail Corporation filed an application before the Hon’ble Delhi High Court under Section 34 of the Arbitration and Conciliation Act, 1996, for setting aside of the award dated 11.05.2017.’ ‘The Delhi High Court dismissed the Section 34 petition of the DMRC’¹⁷, whereby the ‘DMRC filed an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 before the Division bench of the Delhi High Court.’ ‘The Delhi High Court partly allowed the appeal’¹⁸, as a result the ‘DAMEPL approached the Supreme Court of India by filing a Special Leave Petition under Art.136 of the Indian Constitution.’ The Supreme Court of India, allowing the Special Leave Petition, restored the Arbitral Award dated 11.05.2017, in favour of the DAMEPL.¹⁹ Subsequently, the review petition was filed by DMRC against the Supreme Court’s order restoring the arbitral award, and the same was dismissed. Hence, curative petition was filed by DMRC before the Supreme Court of India.

The Supreme Court formulated ‘two issues in the Review Petition viz. (i) maintainability of the curative petition; and (ii) whether the Court was justified in restoring the arbitral award dated 11.05.2017. After hearing the learned counsels for both the parties and analysing the contours of exercise of curative jurisdiction,’ the Supreme Court allowing the Curative Petition observed as follows:

- (a) The judgment delivered by the Division bench of the Supreme Court in restoring the arbitral award dated 11.05.2017, has resulted in grave miscarriage of justice;

¹⁷ Delhi Metro Rail Corporation v. Delhi Airport Metro Express Private Limited, OMP (COMM) No. 307/2017 (Single Judge).

¹⁸ Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited, 2019 SCC OnLine Del 6562 (Del.HC).

¹⁹ Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation, (2022) 1 SCC 131 (SC).

- (b) The Division bench of Supreme Court has restored a patently illegal award which impacts the public utility leading to exorbitant liability, leading to further miscarriage of justice.

ANALYSIS

The Supreme Court of India, ruled in favour of the DMRC by invoking its curative jurisdiction, *inter-alia* on the following reasons:

- (a) **Miscarriage of justice:** The Hon'ble Supreme Court of India relying upon the judgment of 'Rupa Ashok Hurra', observed that the situations enumerated therein are not exhaustive in nature and thereafter relying on the concurring opinion of Justice Banerjee the court observed that the Court can act beyond its jurisdiction resulting in grave miscarriage of justice including manifest injustice, to exercise its jurisdiction under Art.142 of the Indian Constitution.
- (b) **Arbitral Award and Interference by Law Courts:** the court after carefully analysing Section 34 and Section 37 of the Arbitration and Conciliation Act, 1996 observed that an arbitral award can also be challenged on the grounds of patent illegality, if the arbitral award is so perverse or irrational that no reasonable person would have arrived at such a conclusion. In rendering such an observation, the court relied on the Supreme Court cases of 'Associate Builders v. Delhi Development Authority'²⁰ and 'Ssangyong Engineering & Construction Co. Ltd. v. NHAI'²¹. The Court further clarified that the Supreme Court while adjudicating the merits of a case under Special Leave Petition must exercise such a power only in exceptional circumstances, which reasonably justified the exercise of the discretion.
- (c) **The Arbitral Award was Patently Illegal:** The Court observed that the Arbitral Award was perverse as the Supreme Court failed to consider the vital evidence of CMRS certification in deciding the validity of termination of the concession agreement. Therefore, the DMRC was not in breach of the concession agreement.

²⁰ Associate Builders v. Delhi Development Authority; (2015) 3 SCC 49 (SC).

²¹ Ssangyong Engineering & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 (SC).

CONCLUSION:

The judgment delivered by the Supreme Court in the case of DMRC v. DAMEPL, has far reaching consequences for arbitration in India, as it promotes an environment where the investors in a Public-Private Partnership can feel confident about getting justice in case of breach of terms of agreement. Further, the Supreme Court in paragraph 69 of the judgment, has once again reiterated that curative jurisdiction of the Court should be adopted in matters where there is patent illegality, miscarriage of justice, or where principles of natural justice are violated.

The judgment inter-alia has following consequences for the times to come, considering the objective of our country is to make India, a hub of arbitration like its counterparts such as Singapore, Malaysia, London etc.

- a) By allowing the curative petitions, the first and foremost issue the court did not consider was the importance of upholding the integrity of arbitration proceedings and rectification of their outcomes. The court ultimately failed to consider the principle of minimal interference of courts with the arbitral proceedings.
- b) The court by observing that the guidelines in Rupa Ashok Hurra for exercise of curative jurisdiction are non-exhaustive might lead to opening of floodgates thus, creating a fourth or fifth forum of appeal or review before the Supreme Court. Although, till now such a situation has not yet arisen, as most of the cases pertaining to curative jurisdiction have been dismissed the Supreme Court being in violation of guidelines proposed by the case of Rupa Ashok Hurra.
- c) The decision in the present case highlights the courts commitment to upholding of justice, thus, creating a positive environment for investor confidence in our country, thus having larger implications on public-private partnerships, investor confidence, and for the legal system.