
EXTENDING CURATIVE JURISDICTION TO ARBITRATION MATTERS - EXPLORING THE CONSEQUENCES

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ABSTRACT

This paper critically examines the extension of curative jurisdiction to arbitration matters by the Supreme Court of India by analyzing the landmark decision in the Delhi Metro Rail Corporation (DMRC) case., A judicial innovation first articulated in *Rupa Ashok Hurra v Ashok Hurra* (2002), Curative petition allows the Supreme Court to reconsider its own final judgments under extraordinary circumstances, after the review petitions have been dismissed. This article outlines the conditions and procedural requirements for filing curative petitions, which serve as the court's ultimate safeguard against gross miscarriages of justice. The DMRC case marked a significant shift, as the Supreme Court invoked its curative powers to scrutinize the 'patent illegality' of an arbitral award, justifying intervention due to alleged grave procedural errors and unwarranted judicial interference during arbitration proceedings. However, this exercise of curative jurisdiction arguably contradicted established principles of minimal judicial intervention in arbitration, as reinforced in prior judgments such as *N.N. Global Mercantile (P) Ltd v Indo Unique Flame Ltd*. The paper further critically evaluates the fallout from DMRC and focuses on how such intervention jeopardizes India's pro-arbitration image and undermines prior efforts to cultivate India as an arbitration-friendly jurisdiction. The paper also contends the use of public utility as a defence in commercial award cases, despite lacking statutory backing and creating legal uncertainty. Ultimately, the paper contends that the DMRC judgment represents a setback to India's arbitration reform and calls for a re-examination of the scope of curative jurisdiction, advocating for strictly circumscribed judicial review in arbitral matters to preserve the integrity and finality of arbitration.

INTRODUCTION

With the increase in efforts exerted by the Indian courts to improve the arbitration sector in the country, the thorough emphasis by the supervisory courts on maintaining a limited interference approach in matters of arbitration and the Supreme Court's remarks on preserving a pro-arbitration stance, India had a hopeful start towards being a global arbitration hub at the beginning of the year. The Court made remarkable decisions on various vexing issues which included the issues relating to the ability of binding non-signatories to arbitration agreements. This progress and positive stance hit a roadblock when the Supreme Court used its curative jurisdiction to overturn its decision in *Delhi Metro Express Private Ltd v Delhi Metro Rail Corporation Ltd*.

This concept of curative petition was first introduced by the Supreme Court in the *Rupa Ashok Hurra v Ashok Hurra (2002)* judgment, wherein an extraordinary special jurisdiction was created by the highest court in the country to revise or relook at its own decision passed in a review petition. Ideally, the hierarchy of the court allows an aggrieved party who wishes to challenge the order of the High Court to file a petition in the Supreme Court, and if the parties were aggrieved by the new decision they were permitted to file a review petition. As a final resort in the rarest of the rare cases, the parties subject to the fulfilment of certain specific conditions were allowed to challenge the review petition by filing a curative petition. This power of Curative Petition was not established by the Parliament through the enactment of a law but by the Supreme Court itself by exercising its power under Article 137 of the Indian Constitution.

CURATIVE PETITION - A BRIEF

The power of curative petition was invoked by the court under Article 137 of the Constitution in the *Rupa Ashok Hurra* case for the very first time. This article gave Supreme Court the power to review judgments or orders already made, subject to the provisions of the laws made by the Parliament or rules made under Article 145. While the new alternative gave parties the option to challenge the review petition, this was subject to certain conditions. The conditions were such that in cases wherein a review petition is dismissed whilst in circulation, parties can challenge it via curative petition whereas if a review petition is dismissed after a hearing in the open court, a curative cannot be filed. Once a curative petition has been filed it is

presented before the top three senior judges of the court including the judges who dismissed the review petition if present.

The court in the same case further specified the conditions that a party needed to fulfil in order to file a curative petition. Firstly, the petitioner must state that the grounds mentioned in the curative have already been considered in the review petition. Secondly, prove that the review petition was dismissed whilst in circulation. Lastly, the petitioner is required to obtain a certificate from a senior advocate certifying the fulfilment of the said requirements. In order to make leeway for the said conditions the Supreme Court in 2013, amended the Supreme Court Rules and incorporated the provision of curative petition through the Order 48 of the Rules.

FACTS IN BRIEF

The Supreme Court for the first time extended the scope of curative petition to arbitration matters in the case of *Delhi Metro Rail Corporation Ltd V Delhi Airport Metro Express Ltd*. The disputes that arose between DMRC and DAMEPL over a concession agreement in the Airport Metro Express Line Project concluded in a curative petition before the Supreme Court. The arbitral award passed by the three judge bench arbitral tribunal which was initially upheld by the Delhi High Court was struck down by the Division Bench on the grounds of patent illegality and perversity. DAMEPL challenged this through a Special leave petition in the Supreme Court under Article 136, wherein the court dismissed the review petition of DMRC and restored the arbitral award. DMRC challenged this verdict, hence, the curative petition.

The three judge bench constituted for the same, while deciding the petition took into consideration two main factors. First one being the maintainability of the curative petition. The court held that while deciding cases of curative petition, the Supreme Court can extend its jurisdiction only in cases wherein the court's action resulted in grave miscarriage of justice. The second factor decided by the court in deciding the case was the correctness of the decision of the two judge bench in setting aside the judgment given by the Division Bench of the High Court declaring the arbitrary award as patently illegal. The Supreme Court on this issue examined the applicability of Section 34 of the Arbitration and Conciliation Act and how extending curative jurisdiction to the said case might interfere with its scope. The Court held that, while the interpretation of the contract was within the scope of the arbitrator, contracts constructed in a way such that that no reasonable and fair minded person would consent to

cannot be permissible and such awards would amount to patent illegality. Thus, the Court concluded that the arbitral award had overlooked certain express terms of the agreement.

ANALYSIS

The country's arbitration law allows the parties only one appeal, under Section 37 of the Arbitration and Conciliation Act to set aside or to refuse to set aside the arbitral award granted under Sec 34 of the Act. In the said case the option for an appeal was made and exhausted by the parties and a decision for the same was granted in the Delhi High Court itself. Following which the parties filed a Special Leave Petition which is not barred under the Arbitration Act as it is a constitutional granted to parties in their respective case, provided that the Supreme Court may grant the leave to appeal. The judgment specifies that a Special Leave Petition can only be exercised in cases of exceptional circumstances. Further the court clarifies and defines that such exceptional circumstances occur only when the first appellate court errors in exercising its jurisdiction.¹ While exercising the curative jurisdiction to restore the judgment of the Division Bench which was struck down by way of Special Leave Petition, the court cautioned the judges against the interference in arbitration matters and that it can only be exercised in cases of grave miscarriage of justice. As a result the court cautioned that the Supreme Court judges shall avoid interference in cases of appeals wherein the case has already been settled before first appellate court. This would allow for the settlement of matters in the preliminary stage itself.

PATENT ILLEGALITY

The Supreme Court had upheld the decision of the Division Bench of the High Court that the award was vitiated by patent illegality and perversity. Patent Illegality is essentially understood as an error of the law, an inconsistency with common law, statutes or the constitution of the country. The Supreme Court exercised patent illegality for the first time in *Oil And Natural Gas Corporation Ltd V Saw Pipes Ltd* and said that an award will be patently illegal if it contradicts the substantive provisions of law, the arbitration or terms of the contract.² The court

¹ Curse or Cure? Indian Supreme Court exercises “Curative Jurisdiction” Exercising Arbitral Award, Ankit Handa, 2 May 2024, <https://www.livelaw.in/articles/curse-or-cure-indian-supreme-court-exercises-curative-jurisdiction-setting-aside-arbitral-award-256729>

² Patent Illegality in Setting Aside Arbitral Awards: Is India Becoming a Robust Seat for Arbitration <https://www.livelaw.in/lawschoolcolumn/patent-illegality-in-setting-aside-arbitral-awards-is-india-becoming-a-robust-seat-for-arbitration-221421>

also relied on its earlier decisions in *Associate Builders V Delhi Development Authority and Ssangyong Engineering and Construction Co Ltd v NHAI* wherein the awards were set aside for patent illegality if the decision of the arbitrator was found as perverse or irrational in nature such that no reasonable man would have made the same. Factors that constitute an award as perverse include- (a) findings with no substantial evidence to support it. (b) based on irrelevant material and (c) ignores the vital evidence. Lastly, the court held that the interpretation by the tribunal of the termination clause in the Concession Agreement ignored vital evidence, thus amounting to patent illegality and perversity.

APPLICABILITY OF CURATIVE JURISDICTION

In the DMRC case the Supreme Court exercised its inherent curative jurisdiction power to ascertain the patent illegality of the arbitral award as per the provisions of Section 34(2) of the Arbitration and Conciliation Act. The bench also used the unwarranted interference of the court in the Special Leave Petition as a justification for the exceptional circumstances that mandated for the exercise of its curative jurisdiction power. According to the court such interference amounted to a grave miscarriage of justice which was first identified by the court in the Rupa Hurra Case wherein the court laid out a double pronged test to identify the exceptional circumstances that allowed for the exercise of curative jurisdiction.³ In this regard the court held that the “*We have applied the standard of a ‘grave miscarriage of justice’ in the exceptional circumstances of this case where the process of arbitration has been perverted by the arbitral tribunal to provide an undeserved windfall to DAMEPL.*”⁴

While relying on the double layered test laid out in the Rupa Hurra case, in the exercise of curative jurisdiction in the arbitration case, the court seems to have only applied the first condition thus restricting its assessment over the applicability of curative jurisdiction in the case. Consequently the court failed to recognize and apply the second condition, namely whether the bench’s decision in the Special Leave Petition was violative of principles of natural justice or biased in nature.

Secondly, the court’s detailed merit based review of the award when the award had already

³ Three Step Forward, One Step Back? The Indian Supreme Court’s Annulment Of an Award , April 28, 2024 <https://arbitrationblog.kluwerarbitration.com/2024/04/28/three-steps-forward-one-step-back-the-indian-supreme-courts-annulment-of-an-award/>

⁴ Delhi Metro Express Private Limited v Delhi Metro Rail Corporation Private Ltd [(2022) 1 SCC 131]

gone through four rounds of review surpasses the boundaries imposed by the Supreme Court itself while exercising curative jurisdiction in the Rupa Hurra Case. Further, in the *N.N. Global Mercantile (P) Ltd v Indo Unique Flame Ltd* the court had specified the importance of observing a limited judicial- interference approach in the arbitration cases.⁵ The Supreme Court has always observed the importance of judicial restraint while examining the validity of the arbitral awards. Thus, the court's exercise of curative jurisdiction has been in contradiction of its previous judgments of the same.

CONSEQUENCES OF EXERCISING CURATIVE JURISDICTION

A curative petition is a judicial method of final resort allowing the Supreme Court to review its decision in the review petition that can be exercised upon occurrence of extraordinary circumstances. As mentioned by the Constitution Bench in the Rupa Hurra case wherein the concept of curative jurisdiction was first exercised, it can be relied upon only in the rarest of the rarest circumstances, to prevent abuse of judicial process or miscarriage of justice.

Decisions violative of natural justice or ones made out of bias constitute as grounds for parties to seek relief from the court under curative petition. Against this background, the grounds under which the awards were sought by DMRC as relief was purely based on factual matrixes, which required re-interpretation of the agreement and therefore outside the purview of the limited curative jurisdiction of the Supreme Court.

Additionally, while deciding the case, the court also used the defence of public utility against granting commercial awards of such magnitude. This defence faced a lot of criticism as the Indian laws do not recognize such defences in the public procurement as the government is in business for the sake of business and profit. While the court warns against the use of curative jurisdiction in arbitration, the decision itself has hampered the progress that was made in the field of arbitration.

Thus, the Indian courts which were working towards the making of India a global arbitration hub with its pro arbitration stance and positive decisions seems to have hit a roadblock with this case. The Supreme Court itself had emphasized the importance of practicing a hands off approach by the supervisory courts in the matters of arbitration. The court had laid down the

⁵ N.N.Global Mercantile (P) Ltd v Indo Unique Flame Ltd 2023 INSC 1066

bright line tests for deciphering the consent in cases that involved non-signatories and set up guardrails against courts manufacturing consent where none existed. Unfortunately the court's progress dampened with its own merit based decision in the DMRC case.

CONCLUSION

As remarked by the Supreme Court in the Rupa Hurra Case, a curative jurisdiction is exercised by the court in exceptional circumstances provided certain conditions have been fulfilled. The court's use of its curative power in an arbitration case garnering large amounts of criticisms from the legal experts and public at large. The DMRC decision outright reversed the principles of limited judicial interference, arbitrary autonomy and party autonomy the court visaged early on in various arbitration decisions. While the court's ground for overturning the award was patent illegality and perversity which is a ground applicable only to domestic arbitration, the judicial interference in itself has resulted in mass criticism. Thus the decision of the court in the midst of the legislature's reform of the arbitration act to reduce the burden of the court has resulted in a backlash and created concerns with respect to finality, efficiency and effectiveness of arbitration.