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Supreme Court's DMRC Judgement: Unsettling The Settled Law? Part 1

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No warning, however stark, may be enough to withhold the floodgates that have flung open following the SC judgement on the Delhi Rail Metro Corporation's 'Curative Petition.' BW brings you the most intense 'Analysis' of the 'Landmark Case' in the history of Arbitration Awards ever delivered.

The Supreme Court (SC) of India's recent decision to allow and uphold the prayers of a 'Curative Petition' in an 'Arbitration Award' will go down in the annals of legal history globally, since it concerns the country's image as a business hub where commercial arbitrations play a vital role. As it is, 'Curative Petition' is an extremely narrow lane of jurisprudence (unique to Indian judiciary) that challenges the 'Doctrine of Finality' or Res Judicata, which implies that it can be invoked only in the 'Rarest Of Rare Cases' and may not fit the bill on the Intervention of Courts in 'Arbitration Awards,' which are commercial contractual agreement between parties.

The fact that the recent SC decision had the potential to shock even the most jaded soul in the legal fraternity can be gauged by the caveat issued by the Chief Justice of India (CJI) J. DY Chandrachud and the two other judges on the bench J. BR Gavai and J. Surya Kant decided on the 'curative petition.' (Both J. Gavai and J. Surya Kant are in line to be India's next CJI). Before delivering the judgement, the three judges warned, "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."

Although the note of caution was on how not to make 'curative petitions' a norm, the judgement may have "unsettled" principles concerning "Scope of Intervention of Courts in Arbitration Awards" and "Test of Patent Illegality" in setting aside arbitral awards.

Entertaining Curative Petitions in commercial arbitration matters could be bad publicity for India since it comes after the last chance i.e. review petitions are dismissed by the Apex court. All the work done by India's government in the past to amend the Arbitration and Conciliation Act (ACA) to narrow the scope of judicial interventions with a view to prevent abusive appeals and to ensure prompt execution of arbitral awards, fades in the aura of DMRC's Curative Petition.

The DMRC v/s DAMEL (Delhi Airport Metro Express Private Limited) Arbitration Award is already a subject matter of a case study at the Columbia Law School and has been widely published in the American Review of International Arbitration, which shows that the world has set its eye on procedures concerning Arbitration Awards in India.

While on the one hand, the SC has issued a caveat in its DMRC order on opening the floodgates of 'Curative Petitions,' in February the judges at the Apex agreed to hear yet another Curative Petition by Airports Authority of India against the judgment upholding GMR's rights over Nagpur International Airport. If the judgement on the curative petition goes against GMR, the field will be open for other airport operators in India to bid for the Nagpur airport.

DMRC v/s DAMEL: A Case Of Legal Maneuvering

The DMRC filed its curative petition in the SC in June 2022 nearly 8 months after its review petition was dismissed by J. L Nageswararao and J. SR Bhat in November 2021. Before it won reprieve through the Curative Petition, the DMRC had lost an arbitration that stretched for 4.5 years and was concluded in May 2017 in favour of DAMEPL. The hearing on the Curative Petition was held nearly 18 months after it was filed and DMRC got the benefit of 'time shopping' after filing the Curative Petition till both J. Nageswararao and J. Bhat retired. Had the hearing on the Curative Petition happened earlier, there was all the possibility that J. Bhat could have ideally been on the bench hearing the same, since he retired in October 2023 over a year after DMRC filed the Curative Petition.

Both DMRC and DAMEPL were in agreement that the arbitration award was construed to be final and binding on both parties. Importantly, it

was DMRC that took DAMEL to arbitration when their partnership ran aground over some defects in the line identified by the private concessionaire, which were allegedly not cured by DMRC. Citing the inability of the public transport provider to cure the defects, DAMEL terminated the contract and left the project, demanding payments (cost of trains not damages) from the project invoking the concession agreement. When all attempts at resolving the dispute failed, DMRC took DAMEPL to arbitration, which it lost.

Yet, when the DMRC challenged the Arbitration Award that did not go in its favour, it again lost the case in the Delhi High Court (HC), as a Single Bench Judge held that the court had no scope to intervene in the arbitration proceedings. DMRC further appealed this to a Division Bench of the Delhi HC. The bench led by J. Sanjiv Khanna, who delivered the judgement on his last day in the HC before he was moved to the SC, partly allowed the appeal by DMRC and said it was open for both the parties to again go back for arbitration. J. Khanna may succeed incumbent J. Chandrachud as the next CJI.

DMRC had raised new questions at this stage of appeal (in HC when J. Khanna was hearing) and surprisingly, the Division Bench is likely to have engaged with it. Arguably, the HC Division Bench's setting-aside of the award went against Section 34 (2A) of the ACA, which enunciates that courts can set-aside an arbitral award if they find that the award is vitiated by patent illegality and adds that an arbitral award cannot be set-aside merely on ground of an erroneous application of law or by reappreciation of evidence. Moreover, to initiate a set-aside under the ACA, the requester must issue due prior notice under Section 34 and the statute requires such petitions to be expeditiously dealt with within a year from the date of such notice.

In all, the Division Bench's decision was rendered on 15 January 2019, a good 1.5 years after the issuance of the award on 11 May 2017. But Justice Khanna's order and reprieve for DMRC was short lived as a division bench of SC led by J. Nageswararo and J. Bhat dismissed Justice Khanna's order on the grounds that it perverted the principle on intervention of courts in arbitration matters. A review petition of DMRC too was dismissed in the SC by J. Nageswararo and J. Bhat, cementing the 'Doctrine of Finality,' a principle grounded in public policy considerations to prevent abuse of the judicial process, protect parties from harassment by repetitive suits and actions, and promote the efficient use of judicial resources.

Surprisingly, the hearing on the Curative Petition, which was admitted on the grounds of being the rarest of rare cases, did not happen for nearly 18 months - such an utter display of lack of urgency for the rarest of rare cases. It was taken up for hearing in February 2024, nearly four months after J. Bhatt, who was part of the SC bench that had dismissed both the Division Bench order and a review petition, retired after J. Nageswararao. Sadly, unlike the Special Leave Petitions, there is no time bar on hearing of Curative Petitions, a loophole that served the DMRC well.

The legal maneuvering by DMRC like above simply demonstrates to the world and especially the domestic and foreign investors that factual findings and interpretation of the contract given by the arbitrator can be assailed and set aside at any stage of the proceedings in India. Also, the victory of DMRC through a 'Curative Petition' is testimony that past principles laid down by past SC judgments, which imply that an arbitrator is the master of the factual arena and that interpretation of the contract lies exclusively in the domain of the arbitrator, has little credence.

Also, the case showcases glaring loopholes in India’s existing legal regime which has allowed courts to unduly intrude and cause inordinate delays at every stage of the process. For instance, it took ten months to constitute an arbitration panel, 68 hearings to pass an arbitral award which culminated in 4.5 years from the date of invocation of the arbitration clause by DMRC. Then, it went into several layers of appeal, most of which went against DMRC until it finally won by the way of 'Curative Petition.' This DMRC fiasco has perilous costs that will be borne by India as the country's image takes a beating as an unstable destination for Arbitration proceedings.

Curative Petition Vitiates Justice Rohinton Fali Nariman's Judgements?

The SC has often stressed on the need for judicial restraint in examining the validity of arbitral awards and generally advocated for minimal judicial scrutiny. Justice Saraf Committee on Arbitration constituted by the Government was of the view that the proposed amendments (2015) gave room for substantial intervention by the court and were also contentious. Thereafter, on reference, the Law Commission undertook a comprehensive study of the amendments and made further recommendations to cure the defects. This shows that the

intent was always clear: i.e. to keep invention of courts to a minimum in Arbitration matters.

Throughout his illustrious career, SC Judge J. Rohinton Fali Nariman delivered several judgments on arbitration law but his 25 landmark decisions have shaped arbitration proceedings in India. Among the 25, Nariman's two judgments, "Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India" and "Associate Builders v. Delhi Development Authority" had well defined the "Scope of Intervention of Courts in Arbitration Awards." While Justice MB Shah's judgement ONGC v/s SAW Pipes has defined the "Test of Patent Illegality" and when it could be used as a ground to assail an arbitration award under Section 34. These three judgments together mainly provide the scope of interference by courts as a recourse against the arbitral award passed.

However, now after the Curative Petition, which upheld the order of the Division Bench of the HC, the field is open for Arbitration Awards to be challenged in the courts which may scrutinize it in line with Division Bench order of the Delhi HC in DMRC case, even if they do not fit the test of J. Nariman and J. MB Shah's judgements.

The SC in its recent judgement upholding the prayers of the Curative Petition said, "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."

The standard of miscarriage of justice is invoked only when a new fact establishes factual innocence of the claimant after a final conviction order by the final appellate court; thereby recognizing 'wrongful conviction.'

Also, J. Nariman's Landmark Judgement may have a different take than what the SC said while upholding the recent 'Curative Petition.'

Nairman noted that after the 2015 amendments to the Act, the interpretation of the term 'public policy' was narrowed down. He clarified that "Under no circumstance can any court interfere with an Arbitral Award on the ground that justice has not been done in the opinion of that court. This would be an entry into the merits of the dispute, which is contrary to the ethos of Section 34 of the 1996 Act."

Interestingly, the relevant passages of the judgment in Ssangyong

says: "Under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment."

Further, J. Nairman said, "There must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within 'the fundamental policy of Indian law', namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality."

Secondly, J. Nariman's order had also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

When Is An Award Patent Illegal

The arbitral award is in conflict with the public policy of India only if (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. Explanation 2. —For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."
