



**NAVIGATING ARBITRATION'S UNCERTAIN TERRAIN:
THE DMRC-DAMEPL CURATIVE RULING AND ITS
RAMIFICATIONS**

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From Ancient Wisdom to Modern Practice: Tracing Arbitration's Odyssey

Originating in England as early as 1066, Alternative Dispute Resolution (**ADR**) traces its roots to the informal courts where English citizens convened to resolve private disputes. Led by esteemed community members, these gatherings often bypassed the king's court, with the monarch occasionally adopting their decisions, thus laying the groundwork for one of the earliest forms of arbitration.

In 1688, under the reign of William III, Parliament perceived an increase in its bargaining power, culminating in the Bill of Rights of 1689. This landmark legislation notably acknowledged private tribunals, establishing that their awards could only be overturned on grounds of bribery or fraud, being a pivotal moment in legal history.

During the American Colonial era, mediation eclipsed traditional legal proceedings, emphasizing informal resolution methods over formal litigation. Following independence, arbitration primarily addressed patent claims until the 19th century when the Federal Mediation and Conciliation Service (FMCS) was established. Subsequently, in the 1920s, Congress enacted the Federal Arbitration Act 1926, further solidifying ADR place in the American legal landscape.

Overview of Arbitration in India: Navigating Tradition to Modernity

Arbitration in India traces its roots back to ancient times when disputes were resolved through the wisdom of community elders, known as panchayats. This tradition, steeped in cultural heritage, laid the groundwork for the formalization of arbitration under British colonial rule with the Bengal Regulation in 1772. However, it wasn't until the enactment of the Arbitration and Conciliation Act 1940 (**1940 Act**) that India witnessed a significant overhaul of its arbitration landscape.

Before the advent of the Arbitration and Conciliation Act, 1996 (**1996 Act**), arbitration in India was governed by three statutes: the 1937 Arbitration (Protocol and Convention) Act, the 1961 Foreign Awards (Recognition and Enforcement) Act, and the 1940 Indian Arbitration Act. Despite its historical significance, the 1940 Act primarily addressed domestic arbitration, leaving a void in the realm of international dispute resolution.

The shortcomings of the 1940 Act were apparent, particularly its heavy reliance on court intervention throughout the arbitration process. This not only undermined the autonomy of arbitration but also contributed to a perception of unpredictability and inefficiency in India's arbitration regime, hindering its attractiveness to global investors amidst the wave of globalization.

Recognizing the need for reform, the Indian Government repealed all prior arbitration statutes and enacted the 1996 Act. This landmark legislation aimed to create a more efficient and investor-friendly arbitration system in India. Drawing inspiration from international best practices, the 1996 Act is based on the UNCITRAL Model Law, with provisions tailored to address both domestic and international arbitration.

One of the significant departures from the previous regime is the minimization of court intervention in arbitration proceedings. The 1996 Act delineates clear guidelines for arbitration agreements, tribunal jurisdiction, and enforcement of awards, thereby instilling confidence in the arbitration process. Moreover, it recognizes the separability of arbitration clauses, granting arbitrators jurisdiction even if the main contract is deemed void.

The seminal case of '**Renusagar Power Electric Company Vs. General Electric Company**'¹ laid the foundation by defining public policy narrowly, emphasizing that the enforcement of foreign awards should only be refused if they contravene fundamental principles of Indian law, national interests, or notions of justice and morality.

Subsequent cases, notably '**ONGC vs. Saw Pipes Ltd**'² expanded the scope of public policy, permitting refusal of enforcement for awards that are evidently illegal or infringe upon fundamental Indian legal principles.

Concerns over judicial overreach prompted a critical reassessment, culminating in the landmark '**BALCO**'³ decision by the Supreme Court. This pivotal ruling emphasized minimal judicial interference, signalling a pro-arbitration shift. Subsequent amendments, notably the 2015 amendment⁴ reaffirming the public policy doctrine, aimed to strike a balance between autonomy in arbitration proceedings and safeguarding fundamental legal principles.

The interpretation of 'public policy' in arbitration cases in India underwent significant scrutiny following the *Renusagar* supra, leading to an increase in challenges under Section 34 of 1996 Act. This trend continued in cases like **ONGC v. Western GECO International Ltd**.⁵, where the Supreme Court defined 'fundamental policy of Indian law' to include criteria such as adopting a judicial approach, adherence to principles of natural justice, and avoiding cryptic or unreasonable decisions. Further elucidating this, in '**Associate Builders vs. Delhi Development Authority**'⁶, the court highlighted that awards shocking the conscience of the court could be set aside for being perverse to basic norms of justice and morality.

Following the 2015 amendment, courts exercised restraint in interpreting "public policy," limiting grounds for setting aside awards to those enumerated in Section 34 of the Act. This approach aligns with the legislative intent to minimize judicial intervention in arbitration proceedings, ensuring

¹ 1994 Supp (1) SCC 644

² (2003) 5 SCC 705.

³ (2012) 9SCC 552

⁴ *The Arbitration and Conciliation (amendment) Act, 2015. no. 3 of 2016. [31st December, 2015.]*

⁵ (2014) 9 SCC 263.

⁶ (2015) 3 SCC 49.

challenges to awards are selective and meritorious. **State of Jharkhand v. HSS Integrated SDN & Anr**⁷ affirmed that arbitral awards should not be interfered with if the arbitrator's decision is plausible or reasonable.

In **National Highway Authority of India v. Progressive-MVR (JV)**⁸ the Apex Court held that when an arbitrator's decision is reasonable and based on a plausible interpretation of the facts and the law, the court should refrain from interfering with it under Section 34 of the 1996 Act.

In the case of **Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)**⁹, the Supreme Court of India emphasized that if an arbitrator ventures beyond the confines of the contractual agreement between the parties and addresses issues not within their purview, it constitutes a jurisdictional error. Such errors, if manifestly apparent on the face of the award could render the arbitration award liable to be set aside under Section 34 of the 1996 Act.

In 2023, India made strategic strides to bolster its arbitration framework, emphasizing arbitral autonomy over judicial intervention. The Supreme Court of India took pivotal steps to fortify this stance:

Starting from '**NTPC Limited vs SPML Infra Limited**'¹⁰ where the court affirmed that the tribunal is the primary authority for determining arbitrability unless facts demonstrate otherwise. '*In the Interplay between arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*' ("**NN Global**")¹¹ the principle of limited judicial interference, especially at the referral stage, was reiterated, reinforcing arbitration's autonomy.

⁷ (Special Leave to Appeal (C) No. 13117 of 2019)

⁸ (2018) 14 SCC 688)

⁹ (2019) 15 SCC 131

¹⁰ Civil Appeal No. 4778 of 2022

¹¹ 2023 SCC OnLine SC 1666

DMRC vs DAMPEL: A landmark Curative jurisdiction verdict that redefines India's Arbitral Landscape - A Saga of Unanswered questions

However, the Supreme Court of India's decision recently on overturning an Arbitral Award in a Curative Petition¹² filed by Delhi Metro Rail Corporation Ltd (DMRC), marks a significant event in the Indian Judiciary. It is for the first time, an Arbitral Award, having undergone rigorous challenges under both Section 34 and Section 37 of the 1996 Act, followed by scrutiny of the Hon'ble Supreme Court under Article 136 of the Constitution of India, 1950, as well as Review Jurisdiction has been set aside by the Supreme Court under its Curative Jurisdiction, while exercising powers under Article 142 of the Constitution of India, 1950 (**Constitution of India**). The concept of a 'Curative Petition' lacks a statutory definition. However, in the case of Rupa Hurra vs. Ashok Hurra¹³, the Supreme Court delineated it as an extraordinary remedy to be employed sparingly, reserved for circumstances where the integrity of the judgment is called into question due to exceptional '*surrounding circumstances*' such as violation of natural justice or an allegation of bias.

The Supreme Court of India, overturning its own previous view taken in the same set of facts, has now held that the Arbitral Award itself in this case was '*patently illegal*' which led to a '*public utility being burdened with an exorbitant liability*' and thereby leading to '*miscarriage of justice*'. This conclusion is on supposition that the Arbitral Tribunal ignored crucial evidence, namely the Certificate issued by Commissioner for Metro Rail Safety (**CMRS**) while deciding the validity of contract termination by Delhi Airport Metro Express Pvt. Ltd. (**DAMEPL**).

In an intriguing turn, the argument of 'patent illegality,' typically utilized to challenge an award was thoroughly scrutinized through Section 34, Section 37 of the 1996 Act, and Article 136 of the Constitution of India and finally review under Article 137 of the Constitution of India. However, the Hon'ble Supreme Court, invoking the principles of '*miscarriage of justice*' alongside '*patent illegality*,' not only nullified the Arbitral Award but also expressed disapproval of its own prior judgment.

¹² Delhi Metro Rail Corporation Ltd. (DMRC) versus Delhi Airport Metro Express Pvt. Ltd; 2024 SCC Online SC 522

¹³ Rupa Ashok Hurra v. Ashok Hurra & Anr.; (2002) 4. SCC 388

While the Curative Judgment draws upon the *Rupa Hurra* case, it diverges from its essence viz. a judgment can only be reexamined within the Curative Jurisdiction in the rarest of rare cases, specifically when the earlier judgment is under scrutiny for having been passed in an abuse of the legal process, namely;- (i) Being in violation of the principles of Natural Justice and (ii) Giving scope of apprehension of bias due to a Judge who participated in the decision making not disclosing his links.

Once Review Jurisdiction has been exercised, it is not open for parties to raise pleas on merits (either on jurisdiction or on miscarriage of justice). Therefore, grounds such as discovery of evidence, error apparent, and sufficient cause analogous to miscarriage of justice are not admissible in Curative Jurisdiction, the grounds considered under Curative Jurisdiction must all relate to the 'abuse of process' in rendering a judgment and not extend beyond as per the *Rupa Hurra* Case.

In the DMRC supra, the Supreme Court delved extensively into the fundamental facts of the case itself. Especially considering that in commercial disputes, the Arbitral Tribunal handles contract interpretation and fact-finding, with all evidence presented during arbitration. Their decision is binding. Indian courts, governed by Sections 34 and 37 of the 1996 Act, have limited authority to review an award for specific reasons, not acting as appellate authorities. Article 136 of Constitution of India, the Special Leave Petition, is even more restricted, reserved for preventing miscarriages of justice.

Another aspect that the court failed to deal with is that when the judgment was finally delivered in 2024, the interest accumulated to almost double the principal amount, amounting to Rs. 7800 crores. Swift decision making could have prevented such a substantial increase in interest.

The hierarchical structure of adjudication and judicial intervention is based on the premise that once a dispute resolution process has been entrusted to a private mechanism, courts should exercise restraint in interfering with such adjudication. What happens if while exercising Curative Jurisdiction the Court renders a factually incorrect finding of fact or misapplies the contract.

Brief Background of the case

In the present case, DMRC and a consortium led by Reliance Infrastructure Limited and Construcciones Y Auxiliar de Ferrocarriles SA, Spain, known as DAMEPL, signed an agreement in 2008 for building, operating, and maintaining the Delhi Airport Metro Express Line (DAMEPL). The agreement aimed to establish a partnership between the public and private sectors to provide metro rail connectivity between New Delhi Railway Station and the Indira Gandhi International Airport, along with other parts of Delhi.

As per the agreement, DAMEPL had exclusive rights to manage the project as a commercial venture. Under the agreement, DMRC was responsible for obtaining approvals and covering costs related to land acquisition and civil structures, while DAMEPL was responsible for activities such as designing, supplying, installing, testing, and commissioning railway systems. However, in 2012, DAMEPL requested a deferment of the concession fee due to delays in DMRC providing access to the stations. Consequently, DAMEPL ceased operations in July 2012, leading to arbitration proceedings initiated in October 2012. The arbitration was conducted by a three-member tribunal, which ultimately ruled in favour of DAMEPL, passing an arbitral award in their favour after conducting proceedings over a span of more than 4 years.

Conundrum pursuant to the Judgment

Pertinently, under the Agreement assets of DAMEPL can only be transferred to DMRC prior to expiration of the Concession Agreement under two scenarios, one being Termination on account of DAMEPL's Event of Default under and the other being Termination on account of DMRC's Event of Default. In either scenario, the Agreement contemplates that a consideration would be paid for the DAMEPL Assets along with applicable Interest. However, the Supreme Court while rendering the Curative Judgment has not ruled on this aspect and instead, it simply directed DAMEPL to refund the monies it received under the Execution Proceedings back to DMRC. This has led to predicament over the realization of the value of the asset as well as role of Lenders in realizing their project finance.

Effect on future Arbitrations

This Judgment significant to say the least, raises questions about how investors in India will perceive this judgment, especially in the context of Public Private Partnership (PPP) ventures. Investors, particularly in PPP projects, rely on arbitration as a means of resolving disputes in a swift manner.

As Justice Oliver Wendell Holmes Jr. famously quipped, '*The life of the law has not been logic; it has been experience.*' This saying necessitates an evaluation of the court's stand on finality of awards *vis' a vis'* 'patent illegality' over the years to foster a deeper reflection of the constant change.

India's journey towards fostering an arbitration-friendly environment has been marked by significant milestones, notably with the enactment of the 1996 Act. Yet, in the DMRC supra, the plea of '*patent illegality*' which was available to challenge an award under Section 34 of the 1996 Act stood fully exhausted after examination under Section 34, Section 37 of the 1996 Act and thereafter Article 136 of the Constitution of India, and finally review under Article 137 of the Constitution of India was again used in Curative Jurisdiction to set aside an Arbitral award. The Court conducted a detailed analysis of the award's merits, finding that vital evidence had been overlooked, specific agreement terms ignored, and conclusions reached unreasonably.

The decision necessitates for clarity regarding the extent of judicial intervention in arbitration. While judicial oversight is essential to ensure fairness, excessive interference can result in delays and increased costs, defeating the purpose of arbitration. Section 5 of the 1996 Act, stipulates judicial intervention only in specific circumstances, such as public policy and issues of natural justice. Allowing constant challenges and appeals in commercial disputes risks undermining the certainty provided by arbitration.

Despite the Supreme Court's warning, the Judgment now establishes a precedent that challenges to arbitral awards can be brought under the Supreme Court's curative jurisdiction in "*exceptional*" cases. This opens the door for numerous appeals in arbitral awards to be brought before the Supreme Court, attempting to fit their grounds under this "*exceptional*" criteria and alleging "*gross injustice*" by a lower court or bench to invoke the court's curative jurisdiction.

Disclaimer: SKV Law Offices appeared for DAMEPL in the Curative Proceedings before the Hon'ble Supreme Court.