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Three Steps Forward, One Step Back? The Indian Supreme Court's Annulment of an Award

Urvashi Misra, Durga Priya Manda (AZB & Partners) · Sunday, April 28th, 2024

2023 saw India take focused steps to strengthen and fortify its stand as a champion of arbitration, promoting a hands-off judicial approach in favor of arbitral autonomy. The year started with the Indian Supreme Court's first step in *NTPC Limited vs SPML Infra Limited*, where the Supreme Court categorically held that a tribunal is the first point of reference for determining arbitrability unless the facts, ex facie, demonstrate otherwise. This was followed by the second step in *Cox and Kings Limited. v. SAP India Private Limited*, where the Supreme Court cemented the 'Group of Companies' doctrine as part of Indian law – as commented on in a previous post. The year concluded with the Supreme Court's strong, third step in its decision in *In Re – Interplay between arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899* (“*NN Global*”), where the Court re-emphasised the principle of limited judicial interference, particularly at the referral stage, as commented on in a previous post. These targeted steps reinforced and reaffirmed India's pro-arbitration stance.

The Supreme Court's recent decision in *Delhi Metro Rail Corporation Limited vs. Delhi Airport Metro Express Private Limited* (“**DMRC Decision**”), wherein it annulled an arbitral award in exercise of its curative jurisdiction on the ground of patent illegality has, however, raised concerns.

In May 2017, an arbitral tribunal passed an award of approx. INR 3000 crores (approx. USD 360 million) plus interest (“**Award**”) in favour of Delhi Airport Metro Express Private Limited (“**DAMEPL**”) against Delhi Metro Rail Corporation Limited (“**DMRC**”). This Award underwent four rounds of challenge over five years, before DMRC invoked the Supreme Court's curative jurisdiction:

1. Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (“**Act**”) for setting aside the Award, which was dismissed by a Single Judge bench of the High Court of Delhi (“**Section 34 Decision**”);
2. The Section 34 Decision was appealed before a division bench of the High Court of Delhi under Section 37 of the Act (which permits a party to appeal a decision under Section 34), which was allowed and resulted in the Award being partially set aside (“**Section 37 Decision**”);
3. Special leave petition (“**SLP**”) under Article 136 of the [Indian Constitution](#) challenging the Section 37 Decision, which set aside the Section 37 Decision and restored the Award; and
4. Review petition under Article 137 of the Indian Constitution, challenging the SLP's decision, which was dismissed (i.e., the Award was not interfered with).

Pursuant to the above, DMRC, finally and as a last resort, invoked the curative powers of the Supreme Court under Article 142 of the Indian Constitution to challenge the Award.

In its decision, the Supreme Court decided to undertake a detailed merit-based analysis of the Award, including reviewing the evidence based on which the Tribunal passed the Award. On the basis of such analysis, the Supreme Court proceeded to hold that the arbitral tribunal had overlooked vital evidence, ignored specific terms of the agreement between DMRC and DAMEPL and reached a conclusion which was not possible for any reasonable person to arrive at. In view of the above, the Supreme Court proceeded to annul the Award (after more than seven years) and directed DAMEPL to refund a sum of INR 2800 crores (approx. USD 335 million), which had already been paid by DMRC, in execution proceedings initiated by DAMEPL.

In this post, we throw light on the scope of the Supreme Court's jurisdiction in a curative petition and analyse whether the Court has correctly exercised its jurisdiction in the DMRC Decision.

What is the Curative Jurisdiction of the Supreme Court?

The Supreme Court's curative powers can be traced to Article 142 of the Indian Constitution which empowers it to pass such decrees or make such orders as are "*necessary for doing complete justice in any cause or matter pending before it*". Order XLVIII of the Supreme Court Rules, 2013 ("**SC Rules**") further sets out the procedure for filing a curative petition, which must be filed within a reasonable time from the date of the order passed in the review petition.

Under the Indian judicial system, a challenge to an arbitral award Section 34 of the Act lies before the concerned court of first instance. An appeal against a decision passed, lies before the High Court in terms of Section 37 of the Act. In case a party is aggrieved by the decision passed in such an appeal, it can approach the Supreme Court by way of a SLP under Article 136 of the Indian Constitution. Recourse against a decision of the Supreme Court in such a challenge lies under Article 137 of the Indian Constitution, which permits the Supreme Court to review its own decisions. Usually, review petitions are decided by circulation. It is only after the review stage has concluded when the Supreme Court can consider curative petitions under Article 142 of the Indian Constitution. This was the course followed by the parties, which ultimately led to the DMRC Decision.

Thus, a curative petition is the last resort of a litigant who has lost in the review stage. Since the litigant has already exhausted all other remedies by this stage, the scope of the challenge under a curative petition is extremely narrow.

A curative petition must state that the grounds set out therein were taken in the review petition, which was dismissed by circulation. Once filed, the curative petition is first circulated to a bench comprising of the Supreme Court's three senior-most judges and the judges who passed the judgment that is the subject of the curative petition, if they are available. Unless otherwise ordered, such a petition is typically disposed of by circulation without any oral arguments, with the petitioner having the right to supplement their petition with additional written arguments. However, if the Supreme Court bench concludes that the matter should be heard, then it must be listed before the same bench to the extent possible.

Under Order XLVIII of the SC Rules, the Supreme Court is also empowered to impose exemplary

costs on the petitioner, at any stage, if it comes to the conclusion that the curative petition is without merit and vexatious.

What is the Supreme Court's Test for Exercise of Curative Jurisdiction?

The response to this question takes us to the Supreme Court's seminal decision in *Rupa Ashok Hurra vs. Ashok Hurra and Anr.* This case set the boundaries within which the courts can exercise its curative jurisdiction and forms the basis of Order XLVIII of the SC Rules.

The Supreme Court in this case limited the exercise of such jurisdiction to two specific grounds, namely, 'abuse of process' and 'gross miscarriage of justice'. It thereafter proceeded to further fine-tune this criteria by holding that:

"It is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained 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 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." ¹⁾

Thus, in *Rupa Hurra* the Supreme Court limited the scope of its curative jurisdiction to only the two identified grounds, which also must be interpreted through the limited lens of (a) whether they violate principles of natural justice; and (b) bias. This additional level of analysis is important as it ensures that the floodgates are not opened by litigants filing a second review petition as a matter of course under the guise of a curative petition seeking the exercise of inherent powers. ²⁾

Does the DMRC Decision Meet This Test?

In the DMRC Decision, the Supreme Court agreed to exercise its inherent curative powers to determine whether the Award was patently illegal (*i.e., being an award between two Indian parties seated in India, it can be challenged on the ground of patent illegality in accordance with Section 34(2A) of the Act*). It proceeded on the premise that the Section 37 Decision had applied the correct test to hold that the Award suffered from the vices of perversity and patent illegality. ³⁾

The Court justified the exercise of its curative jurisdiction to remedy, what it identified as unjustified court interference at the SLP stage. Such interference, as per the Court, resulted in miscarriage of justice, a ground identified in *Rupa Hurra*. In this regard, the Court held that: "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 the Supreme Court has relied upon the two-layer test set out in *Rupa Hurra* to justify the exercise of curative jurisdiction, it has incorrectly applied this test by restricting its assessment to only the first layer. Consequently, the Court has failed to apply the second and equally important layer of the test, namely, whether the Court's decision in the SLP violated principles of natural justice and/or was hit by bias. Further, its detailed, merit-based review of the Award, after the Award had already undergone four rounds of challenge, transcends the guardrails and boundaries imposed by the Supreme Court for exercise of curative jurisdiction in *Rupa Hurra*. Such detailed review is also contrary to the object of the Act as well as its earlier judgments (including *NN Global*), which prescribe a hands-off limited judicial interference approach in arbitration. As discussed above, the Court's decision in *NN Global* itself arose out of curative petition and the three judges who rendered the DMRC Decision were also on the *NN Global* bench.

Conclusion

The DMRC Decision concludes with a warning that the Supreme Court's exercise of its inherent curative powers ought not to be adopted as a matter of ordinary course. The Court held that:

*“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.”*⁵⁾

Unfortunately, the Supreme Court's conduct of undertaking a detailed review of the Award on merits, including by re-appreciating evidence, is inconsistent with its own warning. As a consequence, the strength of its well-intentioned warning is heavily diluted.

Such extreme interference of undertaking a merits-based review of an arbitral award at the curative stage, adversely impacts the substantial progress made by the Supreme Court last year in promoting a hands-off judicial approach in arbitration matters. It will be interesting to observe the repercussions of the DMRC Decision in the future and the manner in which the Supreme Court balances its findings in the DMRC Decision with its previous judgments.

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References

- ?1 DMRC Decision, ¶50-51
- ?2 DMRC Decision, ¶50
- ?3 DMRC Decision, ¶68
- ?4 DMRC Decision, ¶71
- ?5 DMRC Decision, ¶70

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