

**CASE COMMENT: DELHI METRO RAIL CORPORATION V DELHI AIRPORT
METRO EXPRESS PRIVATE LIMITED**

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INTRODUCTION

Greater autonomy of disputed parties & flexibility are not the only reasons parties choose arbitration but it is also the absence of the appeal after appeal that makes arbitration attractive it's the cornerstone of arbitration. However, the overlapping of the judicial intervention in arbitration can thwart its efficiency. This concern is not arising from thin air, as several people are opting for Arbitration as a subpart of Alternate Dispute Resolution, and the recent judgment of the apex court in Delhi Metro Rail Corporation (DMRC) v. Delhi Airport Metro Express Pvt. Ltd. (DAMEPL)¹ demonstrates the concurrent functioning of the judiciary. The problems with dispute resolution through the court are the exact benefits that are there in Alternate dispute resolution (ADR) and in this also the most developed & sought subpart is Arbitration. Think of an Arbitrator as a third person who's impartial just like a judge, is going to hear both of the disputed parties and at the end of the hearing is going to give an award just like a judgment. The best part about this is that everything is decided by both parties in every part of the process, the parties are very much involved in the process, from appointing the arbitrator to deciding where the process will take place to even also which countries' laws will apply to the proceedings. Parties have much greater autonomy, and all for good reason as this gives assurance to the disputed parties that they are not out of touch, and it really helps when parties have their own skin involved throughout the process.

The arbitration law in India which is the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act") was formulated based upon the model law of UNCITRAL (United Nations Commission on International Trade Law, 1985) after the realization that, to attract investor and increased amount of FDI, the investors needed to have the assurance in any scenario if a dispute arises it will be easy for them to settle the matter and rather than to go through the Indian court system. This in turn was much needed at that point in time because after Globalization and the opening of the Indian economy to the world market in 1991 rate of

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¹ Delhi Metro Rail Corporation v. Delhi Airport Metro Express Pvt. Ltd. (2022) 1 SCC 131.

commercialization was rising at an unprecedented rate. The act is divided into two parts, Part-I which pertains to the domestic procedure of arbitration taking place within India, and Part II which deals with the International procedural aspect of arbitration taking place outside India, which is not enforceable in India. Not all kinds of cases can be referred to arbitration like cases about 'right in rem', i.e., rights that are enforced against society, are non-arbitrable and such matters cannot be referred to arbitration. There exist various types of arbitration like Ad-hoc arbitration, Institutional arbitration, Emergency arbitration & International commercial arbitration, each one having its own operational factors and trigger points for each of them².

These observations made in the set-aside procedures are based on the fundamental premise that parties who agree to arbitrate relinquish their right to a full judicial re-evaluation of the matters before the arbitral tribunal. However, the recent decision of the Indian Supreme Court ("Supreme Court") in Delhi Metro Rail Corporation (DMRC) v. Delhi Airport Metro Express Pvt. Ltd. (DAMEPL) effectively nullifies this premise. To fully appreciate how this occurred, it is necessary to quickly review the case's procedural background. DAMEPL had sought arbitration against DMRC for breach of contract. The arbitral tribunal ("Tribunal") rendered an award in favour of DAMEPL ("Award"). Dissatisfied, DMRC sought to set aside the Award under Section 34 of the Arbitration and Conciliation Act, 1996 ("A&C Act") before a Delhi High Court ("DHC") judge, who dismissed the appeal. However, following DMRC's appeal under Section 37 of the A&C Act, a two-judge bench of the DHC ("Division Bench") overturned the single DHC judge's ruling, concluding that the Tribunal had disregarded critical information in evaluating the legitimacy of the concession deal termination. On DAMEPL's appeal, the Supreme Court reversed the Division Bench's decision and reinstated the Tribunal's award ("Judgment in Appeal"). DMRC's appeal to the Supreme Court to review the judgment was likewise denied ("Review Order"). Despite these successive defeats, DMRC did not give up. It petitioned the Supreme Court for curative relief against the Judgment in Appeal. In an extraordinary move, the Supreme Court granted DMRC's curative motion, overturned the Judgment in Appeal, and upheld the Division Bench's decision to set aside the Award. The Supreme Court's final ruling ("Final Judgment") represents an unusual and significant shift in its approach to award review and interpretation under the A&C Act.

² Arbitration & Conciliation Act, 1996.

FACTS OF THE CASE

In 2008, DMRC and DAMEPL signed a concession agreement to build and operate a high-speed metro line. Shortly after beginning operations, DAMEPL discovered structural flaws that jeopardized safety and harmed DAMEPL's contractual obligations. DMRC was alerted, and DAMEPL's option to cancel the concession agreement if the issues remained unresolved was reiterated. DAMEPL ultimately terminated the concession deal, citing DMRC's failure to fix the flaws. Following the termination notice, DMRC launched arbitration proceedings. Meanwhile, DAMEPL and DMRC submitted a combined application to the Commissioner of Metro Railway Safety ("CMRS") to reopen the metro line for public use. For context, CMRS is a statutory organization established by the Metro Railways (Operation and Maintenance) Act, 2002 ("Metro Act") to analyse the safety risks associated with running metro lines.

A few days later, the CMRS imposed a punishment that restricted the metro's operating to specific speeds. Finally, in July 2013, while the termination case remained unresolved, DMRC acquired the assets and began operating the metro line. The Tribunal's fundamental issue was whether DAMEPL³ had lawfully terminated the concession agreement. After considering the evidence, the Tribunal determined that DAMEPL had legitimately terminated the concession agreement due to unsolved structural problems in the metro line, which had a major influence on DAMEPL's obligations. The Tribunal determined that these deficiencies jeopardized the structure's stability and remained ignored after the cure time. It rejected DMRC's claim that the CMRS sanction suggested that the faults had been resolved, finding that neither the CMRS sanction nor the metro's ongoing operation were relevant to the termination's legitimacy. The Tribunal's contempt for the CMRS punishment formed the basis of the challenge to the Award.

LEGAL ISSUES

The Supreme Court decided the following issues in this case:

1. Is the curative petition maintainable?

³ Raizada S, 'How Many Bites of the Same Cherry Does it Take to Overturn an Arbitration Award? Unpacking the Indian Supreme Court's Decision in Delhi Metro Rail Corporation v. Delhi Airport Metro Express Pvt. Ltd' (*Kluwer arbitration*, 10 July 2024) <<https://arbitrationblog-kluwerarbitration-com.elibrary.nirmauni.ac.in/2024/07/10/how-many-bites-of-the-same-cherry-does-it-take-to-overturn-an-arbitration-award-unpacking-the-indian-supreme-courts-decision-in-delhi-metro-rail-corporation-v-delhi-airport-metro-express-pv/>> accessed 11 July 2024.

2. Whether the Supreme Court's decision to reinstate an arbitral award that had previously been overturned by the High Court's division bench was justified.

OBSERVATION OF SUPREME COURT

The Supreme Court examined the complaint that the Tribunal disregarded the CMRS sanction under Section 34(2-A) of the A&C Act, which states that an award may be set aside if it contains "patent illegality" on its face. Before addressing this issue, the Supreme Court detailed the patent illegality test as established in two previous decisions, *Associate Builders v. Delhi Development Authority* and *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*. In these two cases, the Supreme Court stated that the test of patent invalidity that invalidates an award can cover a wide variety of situations. For example, an award is considered illegitimate if it is "based on no evidence at all" or "ignores vital evidence" when making its conclusion. When using this criterion, the Supreme Court divided its analysis into two distinct but interconnected sections. The first section addressed the problem of contractual interpretation, while the second half focused on the alleged exclusion of the CMRS sanction from consideration.

For this case comment we will delve deeper into the second part of the judgment.

Before getting into the details of the case, the court stressed the need to keep judicial intervention to a minimum in arbitral awards. As a result, the Supreme Court scrutinized the judicial parameters of Section 34 in great detail. The court determined that the Arbitration Act aims to minimize judicial intervention, hence it is acceptable for the court to refrain from evaluating or re-appreciating facts or law under Section 34. The court went on to identify the occasions where it is appropriate for the court to intervene in an arbitral award, which primarily includes instances in which the arbitrator acted rashly and made a decision that no man of ordinary prudence would make. It also covers cases in which the arbitrator acted rashly and rendered a ruling that no man of ordinary prudence would make. It also includes situations in which the arbitrator deviated from the contract, committing a jurisdictional error. The court discussed the patent illegality that led to the award being thrown aside by the High Court's division bench. The court noted that the illegality must be at the heart of the situation and cannot be superficial. Thus, it would be inaccurate to claim that every legal error is 'patently criminal'. According to the court, an arbitral award may be declared blatantly invalid if it is based on no evidence, ignores critical evidence, or fails to provide reasons. Before reaching the

final ruling, the court also stressed the "public policy of India" The court clarified that if an arbitral award affects the court's conscience, it will be considered a violation of basic justice principles. The Court, therefore, observed that the judgment of the two-judge Bench, which interfered with the judgment of the Division Bench of the High Court, resulted in a miscarriage of justice, and that it applied the correct test in holding that the arbitral award was perverse and patently illegal.

DECISION

The apex court observed:

"In the specific facts and circumstances of this case to which we have adverted in the course of the discussion, we have come to the conclusion that this Court erred in interfering with the decision of the Division Bench of the High Court. The judgment of the Division Bench in the appeal under Section 37 of the Arbitration and Conciliation Act 1996 was based on a correct application of the test under Section 34 of the Act. The judgment of the Division Bench provided more than adequate reasons to conclude that the arbitral award suffered from perversity and patent illegality⁴."

Patent Illegality of the Award.

The Supreme Court chastised the Tribunal for failing to consider the CMRS sentence while deciding on contract termination. The Supreme Court regarded the CMRS censure as a "vital piece of evidence" in deciding whether DAMEPL's reasons for terminating the concession deal were legitimate. The Supreme Court upheld this judgment with a two-fold reasoning. First, it noted that DAMEPL stressed the metro line's safety when it issued the notice to fix the defect to DMRC, showing that safety was a primary priority in the dispute. This made the safety of the metro line a direct issue for the parties⁵. To support this decision, the Supreme Court reviewed the provisions of the Metro Act and concluded, in paragraph 63⁶ of the Final Judgment, that the grant or refusal of sanction was directly related to public safety. Based on these findings, the Supreme Court determined that it was wrong for both the Award and the Judgment in Appeal to ignore the importance of the CMRS sanction in the context of the

⁴ Delhi Metro Rail Corporation v. Delhi Airport Metro Express Pvt. Ltd. (2022) 1 SCC 131.

⁵ Singh, S. (2024, February 13). *Patent Illegality In Setting Aside Arbitral Awards: Is India Becoming A Robust Seat For Arbitration?* livelaw. in. <https://www.livelaw.in/lawschoolcolumn/patent-illegality-in-setting-aside-arbitral-awards-is-india-becoming-a-robust-seat-for-arbitration-221421>.

⁶ Delhi Metro Rail Corporation v. Delhi Airport Metro Express Pvt. Ltd. (2022) 1 SCC 131.

termination issue. By rejecting this evidence, the Supreme Court determined that the Award was unconstitutional.

ANALYSIS

There are three key issues with the Supreme Court's argument. For starters, its methodology severely limits a tribunal's ability to consider and assess evidence. By reopening and evaluating the material in the manner that it did, the Supreme Court effectively re-determined the factual issues at stake in the dispute, in violation of Section 34(2-A). This re-determination diminishes the key justification for the parties' decision to arbitrate rather than litigate their disagreements. By agreeing to arbitration, a party waives the right to have a court assess the merits of the dispute, including factual issues, and retains only the limited right to seek judicial review of the arbitrator's decision in exceptional instances. Second, it appears that the Supreme Court did not fully understand the essence of the CMRS sanction dispute. The essential question was whether the Tribunal was justified in attaching insufficient weight to the CMRS punishment, rather than whether the Tribunal had completely missed it. However, the Supreme Court jumbled these ideas, mistaking the former for the latter. In doing so, it failed to recognize that the Tribunal had reviewed the CMRS sanction and found that it did not support DMRC's assertion that the faults were fixed. Even the DHC judge supported the Tribunal's assessment of the relevance and impact of the CMRS sentence on the termination issue, denying DMRC's Section 34 objection. Furthermore, there is greater worry about the choices available under the Supreme Court's current doctrine for challenging a judgment because a tribunal ignored a critical piece of evidence. In DAMEPL, this freedom was jeopardized because the Supreme Court examined the Award using a criterion more appropriate for judicial determinations. By doing so, the Supreme Court inappropriately imposed judicial expectations on the arbitral process, changing the court's restricted jurisdiction under Section 34(2-A) of the A&C Act into a court with universal appellate authority. Given this environment, it becomes prudent for the Supreme Court to reconsider the appropriateness of allowing parties to challenge an award because the tribunal ignored or disregarded critical evidence. The current liberal use of these criteria by courts results in excessive litigation, allowing parties to constantly contest an award.

CONCLUSION

The Supreme Court ruled that the two-judge Bench's interference with the Division Bench's ruling resulted in a miscarriage of justice. The Division Bench of the High Court used the proper standard to determine that the arbitral award was perverse and patently illegal. Furthermore, the Supreme Court stated that the Division Bench of the High Court's findings were supported by the evidence and were not based on a misunderstanding of law or facts. By overturning the High Court Division Bench's decision, the Supreme Court's two-judge bench reinstated an unconstitutional award that saddled a public utility with an excessive liability. This resulted in a gross miscarriage of justice, necessitating the use of the authorities under Article 142 of the Indian Constitution in a curative petition.

