[2024] 4 S.C.R. 473 : 2024 INSC 292

Delhi Metro Rail Corporation Ltd.
v.
Delhi Airport Metro Express Pvt. Ltd.

Curative Petition (C) Nos.108-109 of 2022
In
Review Petition (C) Nos.1158-1159 of 2021
In
(Civil Appeal Nos 5627-5628 of 2021)

10 April 2024

[Dr Dhananjaya Y Chandrachud,* B R Gavai and Surya Kant, JJ.]

Issue for Consideration

(i) Whether the curative petition is maintainable; and (ii) Whether this Court (two-judge Bench) was justified in restoring the arbitral award which had been set aside by the Division Bench of the High Court on the ground that it suffered from patently illegality.

Headnotes

Curative Petition – Curative Jurisdiction may be invoked if there is a miscarriage of justice:

Held: The Supreme Court laid down an overarching principle in *Rupa Hurra v. Ashok Hurra* [2002] 2 SCR 1006 that the Court may entertain a curative petition to (i) prevent abuse of its process; and (ii) to cure a gross miscarriage of justice – The enumeration of the situations in which the curative jurisdiction can be exercised is not intended to be exhaustive – The Court went on to lay down certain procedural requirements to entertain a curative petition such as a certificate by a Senior Advocate about fulfilling of the requirements. [Paras 33 and 34]

Arbitration and Conciliation Act 1996 – s.34 – Scope of interference of courts with arbitral awards:

Held: Section 34 of the Arbitration Act delineates the grounds for setting aside an arbitral award – In addition to the grounds on which an arbitral award can be assailed laid down in section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case – Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the

* Author

Court finds that it is vitiated by 'patent illegality' appearing on the face of the award. [Paras 36, 37]

Arbitration and Conciliation Act 1996 – s.34 – Setting aside of domestic award – Ground of patent illegality:

Held: The ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view – A 'finding' based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of 'patent illegality' – An award without reasons would suffer from patent illegality – The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice. [Para 40]

Constitution of India – Art.136 – Arbitration and Conciliation Act 1996 – ss. 34, 37 – Remedy u/Art. 136 against a decision rendered in appeal u/s. 37 of 1996 Act:

Held: In the statutory scheme of the Arbitration Act, a recourse to s.37 is the only appellate remedy available against a decision u/s. 34 – The Constitution, however, provides the parties with a remedy u/Art. 136 against a decision rendered in appeal u/s. 37 – This is the discretionary and exceptional jurisdiction of the Supreme Court to grant Special Leave to Appeal – While adjudicating the merits of a Special Leave Petition and exercising its power u/Art. 136, this Court must interfere sparingly and only when exceptional circumstances exist, justifying the exercise of this Court's discretion – The Court must apply settled principles of judicial review such as whether the findings of the High Court are borne out from the record or are based on a misappreciation of law and fact – In particular, this Court must be slow in interfering with a judgement delivered in exercise of powers u/s. 37 unless there is an error in exercising of the jurisdiction by the Court u/s. 37. [Paras 42 and 43]

Curative Petition – The petitioner-DMRC and DAMEPL (a special purpose vehicle incorporated by a consortium) entered into the Concession Agreement (2008 agreement) – DAMPEL was to undertake among other things, the design, supply, installation, testing and commissioning of railway

system – Dispute arose between the parties – DAMEPL alleged that the line was unsafe to operate – Operations were stopped – DAMEPL issued a notice to DMRC listing defects attributable to faulty construction and deficient designs which affected project safety – DMRC was requested to cure the defects within 90 days from the date of this notice – Thereafter, DAMPEL issued another notice terminating the 2008 agreement as defects were not cured within 90 days – Arbitral Tribunal passed award in favour of DAMPEL – Single Judge of the High Court dismissed the petition filed u/s. 34 of 1996 Act – Division Bench of the High Court allowed the appeal u/s. 37 of 1996 Act in part – DAMEPL moved a SLP u/Art. 136 of the Constitution – A two-judge bench of the Supreme Court allowed the appeal, and restored the award – Correctness:

Held: Commissioner of Metro Railway Safety (CMRS), after inquiry and inspection had issued sanction for running of the metro line – In the instant case, the Division Bench of the High Court found the award to be perverse, irrational and patently illegal since it ignored the vital evidence of CMRS certification in deciding the validity of termination – It underlined the significance of the CMRS sanction under the Metro Railways (Operation and Maintenance) Act, 2002 – Also, clause 29.5.1(i) of the 2008 agreement entitles the concessionaire to terminate the agreement if DMRC "failed to cure such breach or take effective steps for curing such breach" within the cure period – Pertinently, the clause uses two separate phrases, "cure" and "effective steps to cure" – The Tribunal found that since certain defects remained after the cure period, this was indicative of the fact that the defects were not cured and that no effective steps were taken – The Tribunal fails to explain what amounts to an 'effective step' and how the steps taken by DMRC were not effective, within the meaning of the phrase – Parties clearly intended that once a cure notice was served on a party, it would be open to them to either cure defects or to initiate effective steps, even if they could not culminate into the complete curing of defects within the cure period – Incremental progress, even if it does not lead to complete cure, is an acceptable course of action to prevent termination according to the 2008 Agreement – The decisions of the Single Judge of the High Court and this Court (two-judge bench) are similarly silent on the aspect of "effective steps" – The judgment of this Court also never tested the relevance

of the CMRS certificate vis-à-vis "effective steps" – Admittedly, some of the defects were cured in their entirety and steps were taken by DMRC to cure the remainders – DMRC did take certain steps to alleviate DAMEPL's concerns so as to warrant this change of position – There is no explanation forthcoming in the award about why none of these steps initiated during the cure period were 'effective steps' – This gap in reasoning stems from the arbitral tribunal wrongly separating the issue of termination and the CMRS certificate – The structure and safety of the project, as certified by the CMRS, were thus relevant before the Tribunal, making the CMRS certificate a vital piece of evidence in deciding the issue – The CMRS certificate was relevant evidence about the safety of the structure – The arbitral tribunal erroneously rejected the CMRS sanction as irrelevant – The Division Bench correctly held that the arbitral tribunal ignored vital evidence on the record, resulting in perversity and patent illegality, warranting interference – The conclusions of the Division Bench are, thus, in line with the settled precedent including the decisions in Associate Builders and Ssangyong – The judgment of the two-judge Bench of this Court, which interfered with the judgment of the Division Bench of the High Court, has resulted in a miscarriage of justice – Thus, Curative Petitions allowed. [Paras 44, 48, 49, 50, 53, 54, 58, 67, 68]

Case Law Cited

Rupa Hurra v. Ashok Hurra [2002] 2 SCR 1006 **: 2002 4 SCC 388;** *Associate Builders v. Delhi Development Authority* [2014] 13 SCR 895 **: 2015 3 SCC 49;** *Ssangyong Engineering & Construction Co. Ltd. v. NHAI* [2019] 7 SCR 522 **: 2019 15 SCC 131 – relied on.**

List of Acts

Arbitration and Conciliation Act 1996; Arbitration and Conciliation (Amendment) Act, 2015; Metro Railways (Operation and Maintenance) Act, 2002.

List of Keywords

Curative Petition; Arbitral awards; Miscarriage of justice; Patent illegality; Special leave to appeal by the Supreme Court; Concession Agreement; Arbitration; Defects; Faulty construction; Deficient designs; Cure; Effective steps to cure; Vital evidence on record.

Delhi Metro Rail Corporation Ltd. v.
Delhi Airport Metro Express Pvt. Ltd.

Case Arising From

INHERENT JURISDICTION: Curative Petition(C) Nos. 108-109 of 2022

In

Review Petition(C) Nos. 1158-1159 of 2021

In

Civil Appeal Nos. 5627-5628 of 2021

From the Judgment and Order dated 23.11.2021 in R.P.(C) No. 1158 and 1159 of 2021 and dated 09.09.2021 in C.A. No. 5627 and 5628 of 2021 of the Supreme Court of India

Appearances for Parties

R. Venkataramani, AG., K.K. Venugopal, Parag P Tripathi, Maninder Singh, Sr. Advs., Tarun Johri, Ankur Gupta, Vishwajeet Tyagi, Srinivasan Ramaswamy, Chitvan Singhal, Ms. Ashita Chawla, Ankur Talwar, Ms. Arushi Mishra, Ameyavikrama Thanvi, Kartikey Aggarwal, Advs. for the Petitioner.

Harish N Salve, Kapil Sibal, J.J. Bhatt, Prateek Seksaria, Sr. Advs., Mahesh Agarwal, Rishi Agrawala, Shri Venkatesh, Megha Mehta Agarwal, Pranjit Bhattacharya, Ms. Madhavi Agarwal, Suhael Buttan, Vineet Kumar, Ms. Manisha Singh, Nishant Chothani, E.C. Agrawala, Advs. for the Respondent

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

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* Ed. Note: Pagination as per the original Judgment.

1. The curative jurisdiction of this Court under Article 142 of the Constitution has been invoked in regard to its decision in **Delhi Airport Metro Express Private Limited vs. Delhi Metro Rail Corporation Ltd**.[1]. The judgment remained undisturbed in the exercise of the review jurisdiction of this Court.[2]

A. Factual Background

2. The petitioner, Delhi Metro Rail Corporation[3] is a state-owned company wholly owned by the Government of India and the National Capital Territory of Delhi. The respondent, Delhi Airport Metro Express Private Limited[4] is a special-purpose vehicle incorporated by a consortium comprising of Reliance Infrastructure Limited and Construcciones Y Auxiliar de Ferrocarriles SA, Spain. The consortium bagged the contract for the construction, operation and maintenance of the Delhi Airport Metro Express Ltd[5] in 2008. The Concession Agreement[6] envisaged a public-private partnership

1 (2022) 1 SCC 131.

2 Review Petition (C) Nos. 1158-1159/2921.

3 "DMRC"

4 "DAMEPL"/" Concessionaire"

5 "AMEL"

6 "2008 Agreement"

for providing metro rail connectivity between New Delhi Railway Station and the Indira Gandhi International Airport and other points within Delhi.

3. Under the 2008 Agreement, DAMEPL was granted exclusive rights, license and authority to implement the project and concession in respect of AMEL. This included the right to manage and operate the Project as a commercial enterprise. DMRC was to undertake clearances and bear costs relating to land acquisition, and civil structures, while DAMEPL was to undertake among other things, the design, supply, installation, testing and commissioning of railway systems. DAMEPL was to complete the work in two years, and thereafter, to maintain AMEL until August 2038.

4. In April 2012, DAMEPL sought a deferment of the concession fee, citing delays in providing access to the stations by DMRC. DAMEPL stated that while AMEL had been running without a glitch since 23 February 2011, the retail activity had not picked pace. DAMEPL urged DMRC to extend their support, to this first-of-its-kind public-private partnership by deferring the concession fee payable by DAMEPL.

5. There was an exchange of correspondence between the parties which ultimately led the Ministry of Urban Development to convene a meeting of stakeholders in July 2012. A Joint Inspection Committee was set up to inspect the defects alleged by DAMEPL.

6. Meanwhile, DAMEPL expressed its intention to halt operations, alleging that the line was unsafe to operate. Operations were stopped on 08 July 2012. On 09 July 2012, DAMEPL issued a notice to DMRC containing a 'non-exhaustive' list of eight defects which according to them, affected the performance of their obligations under the 2008 Agreement[7]. The notice stated that the defects were attributable to faulty construction and deficient designs which affected project safety.

7. DAMEPL stated that the defects caused a "material adverse effect" on the performance of the obligations by it to operate, manage and maintain the project. DMRC was therefore requested to cure the defects within 90 days from the date of this notice, failing which it stated that it would be considered that a "Material Breach" and

7 "Cure Notice"

a "DMRC Event of Default" had occasioned, entitling DAMEPL to terminate the 2008 agreement.

8. On 8 October 2012, DAMPEL issued a notice terminating the 2008 agreement.[8] The termination notice stated that as 90 days had elapsed since the cure notice in spite of which the defects had not been cured within the 'cure period', DAMEPL as Concessionaire was terminating the agreement in terms of clause 29.5.1 of the 2008 agreement.

9. DMRC initiated conciliation under clause 36.1 of the 2008 Agreement. Since conciliation did not succeed, DMRC initiated arbitration proceedings on 23 October 2012 under clause 36.2 of the 2008 agreement.

10. On 30 June 2013, DAMEPL halted operations and handed over the line to DMRC. Before this, on 19 November 2012, both parties made a joint application to the Commissioner of Metro Railway Safety[9] for re-opening of AMEL for public carriage of passengers. Enclosed with the application, was an administrative note jointly signed by representatives of both DAMEPL and DMRC, which we shall avert to in the course of the judgment.

11. Following this application, after inquiry and inspection, the CMRS issued sanction on 18 January 2013. This sanction was subject to certain conditions including speed restrictions. Specifically, the metro was to be run at a speed of 50kmph, and an increase in speed beyond 50kmph up to 80kmph was to be authorized in steps of 10kmph at a time. For an increase in speed beyond 80kmph, DMRC was to approach the Commissioner for sanction with a justification as to the improvements carried out by it.

12. Consequently, on 22 January 2013, AMEL operations were commenced by DAMEPL. On 30 June 2013, the project assets were handed over by DAMEPL to DMRC. After that, from 01 July 2013, DMRC continued AMEL operations.

13. In August 2013, the arbitral tribunal comprising Mr AP Mishra, Mr SS Khurana and Mr HL Bajaj was constituted.[10] On 11 May 2017,

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8 "Termination Notice"

9 "CMRS"/"Commissioner"

10 "Tribunal"

the three-member Tribunal passed a unanimous award in favour of DAMEPL[11].

14. The award held that DAMEPL was entitled ***first,*** to the termination payment **of** Rs. 2782.33 Crores plus interest **in** terms of the concession agreement; ***second,*** to expenses incurred in operating AMEL from 07 January 2013 to 30 June 2013 and debt service made by DAMEPL during this period, of Rs 147.52 Crores plus interest at 11% per annum from the date of payment of stamp duty; ***third,*** to the refund of the bank guarantee amounting to Rs 62.07 Crores plus interest at 11% p.a. which had been encashed; ***fourth,*** to security deposits with the service providers, amounting to Rs 56.8 Lakhs plus interest at 11% p.a.; and that DMRC was entitled to Rs 46.04 Crores as Concession fee for the period from 23 February 2012 to 7 January 2013.

15. Assailing the award, DMRC instituted an application under Section 34 of the Arbitration and Conciliation Act 1996[12] before the Delhi High Court. The Single-Judge of the High Court dismissed the petition[13]. This gave rise to an appeal under Section 37 before a Division Bench of the High Court. The appeal was partly allowed.[14]

16. Against the decision of the Division Bench of the High Court, DAMEPL moved a Special Leave Petition under Article 136 of the Constitution. A two-judge bench of this Court allowed the appeal, and restored the award. The review petition assailing this decision was dismissed. Thus, the curative petition.

B. DMRC's claim and the Tribunal's findings

17. Before the Tribunal, DMRC claimed that – (i) it took steps to cure the defects immediately after it received the cure notice, including approaching SYSTRA -the original design consultant and convening meetings with the Ministry of Urban Development and that DAMEPL actively participated in all of these steps; (ii) that the real reason for the termination notice was that DAMPL had ceased to find the project financially viable. DMRC sought, *inter alia*, quashing of the

11 "Award"

12 "Arbitration Act".

13 OMP (COMM) 307/2017 & OMP (I) (COMM) 200/2017 ('Single Judge')

14 FAO(OS)(COMM) 58/2018 & CM Nos. 13434/2018 ('Division Bench')

termination notice; and a direction to the respondent to resume the performance of its obligations under the 2008 agreement. DAMEPL, on the other hand, claimed that there were defects attributable to DMRC's faulty design; that these defects were not cured and no effective steps were taken to cure them within the 90-day cure period, resulting in material adverse effects to DAMEPL, entitling it to terminate the concession agreement.

18. The Tribunal was required to adjudicate on the validity of the termination notice. It framed the following issues:

> "Were there any defects in the civil structure of the airport metro line?
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> If there were defects, did such defects have a material adverse effect on the performance of the obligation of DAMEPL under CA?
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> If there were defects in the civil structure, which had a material adverse effect on the performance of the obligations under the CA by DAMEPL, have such defects been cured by DMRC and/or have any effective steps been taken within a period of 90 days from the date of notice by DAMEPL to cure the defects by DMRC and thus, were DMRC in breach of the CA as per 29.5.1 (i)?"

19. The Tribunal undertook an analysis of the defects in the structure and whether they had been cured or effective steps taken during the cure period. It noted that 72% of the girders were affected by cracks; the cause of the cracks was uncertain; the depth of the cracks was not reliably determined; and that the inspection for repairs carried out at the instance of DMRC was 'non-serious'. Further, it noted that there were twists in about 80 girders and gaps between the shear key and the girders which were not cured by DMRC in the cure period. Taken together, these defects were considered to have compromised the integrity of the structure. This, the Tribunal held, amounted to a breach of DMRC's obligations under the 2008 agreement resulting in a material adverse effect on the concessionaire.

20. The Tribunal framed the legal issues that arose for its consideration. The issue about the validity of the termination agreement was framed in the following terms:

> "D. Was DAMEPL entitled to or justified in termination of the CA, since the cost of repairs of the alleged defects was only approximately Rs.14 crores as compared to the total costs of the project of approximately Rs. 5700 crores?"

21. The issue pertaining to the CMRS certificate was framed as follows:

> "H. Did the issuance of certificate by CMRS show that the defects were duly cured?"

22. Both these issues were answered in the negative by the Tribunal. On Issue 'D' about the validity of the termination, it was held that since the Tribunal had found that there were defects in the civil structure, which remained uncured during the cure period, the amount incurred by DMRC in repairs compared to the overall cost of the project was irrelevant.[15] On issue 'H', about the CMRS certificate, the tribunal found that the CMRS sanction mandated rigorous monitoring of operations of the line and imposed a speed restriction. Since the purpose of the line was to serve as a high-speed line, the tribunal found that the speed restrictions meant that this purpose was not served and therefore, the CMRS certificate or the subsequent operation of the line were not relevant in deciding the issues before it.[16]

C. Decisions of the High Court

23. The Single Judge of the High Court[17], deciding the Section 34 application, upheld the award, observing that so long as the award was reasonable and plausible, considering the material before the Tribunal no interference was warranted, even if an alternate view was possible. It was held that the Tribunal, in this case, had analysed material and evidence in great detail, and arrived at a plausible conclusion.

24. The Division Bench of the High Court[18] partly set aside the award as perverse and patently illegal, for the following reasons:

    24.1. On the validity of the termination, ex-facie, the termination which was effective immediately from the date of termination

15 The Award, para 93.

16 ibid, paras 105-108.

17 "Single Judge".

18 "Division Bench".

was invalid. There was some ambiguity on the relevant date of termination. The award did not interpret clause 29.5.1(i) of the concession agreement regarding the duration of the cure period;

24.2. The speed restrictions were not stated as the reason for termination in the cure or termination notices and there was no deliberation on this being a justification for termination before the Tribunal. Thus, the award was silent and unreasoned on this issue; and

24.3. Underlining the significance of the CMRS sanction under the Act of 2002, the findings of the tribunal on this issue were incorrect because (i) the award overlooked the legal effect of the CMRS certificate which was binding on the tribunal; and (ii) the award erroneously treated the CMRS certificate as irrelevant to the issue of the validity of the termination by wrongly separating the issue of defects and material adverse effects from the issue of the certificate.

D. Judgment of this Court in appeal

25. This Court set aside the decision of the Division Bench and restored the arbitral award on the following grounds:

25.1. There was no ambiguity in the date of termination and even if a different view from that of the tribunal were possible, construction of the provisions of the contract was within the exclusive domain of the tribunal;

25.2. The award was not perverse. The finding of the tribunal that the defects were not cured was a finding of fact, not warranting interference;

25.3. DMRC had not contended before the Tribunal that the certificate was binding and conclusive of the fact that the defects were cured or that effective steps had been taken; and

25.4. The Division Bench of the High Court was in error in holding that the issue of the CMRS certificate was wrongly separated from the issue of defects. It held that dealing with the certificate separately from the validity of termination did not render the tribunal's findings on the latter erroneous. The Tribunal comprised of engineers and the award could not

be scrutinised in the same manner as an award drawn by a legally trained mind.

26. The review petition against the above judgment of this Court was dismissed on 23 November 2021.

E. Issues in the Curative Petition

27. The issues that arise for our consideration are (i) whether the curative petition is maintainable; and (ii) whether this Court was justified in restoring the arbitral award which had been set aside by the Division Bench of the High court on the ground that it suffered from patently illegality.

F. Submissions

28. We have heard Mr R Venkataramani, Attorney General for India and Mr K K Venugopal, Mr Parag Tripathi, and Mr Maninder Singh senior counsel on behalf of the petitioners. They made the following submissions:

    28.1. Considering the definition of 'material adverse effect' under the concession agreement, the defects had no material adverse effect on DAMEPL's performance of obligations under the agreement, as is apparent from the running of the metro line. The purpose of the agreement was fully subserved, as evinced by the continuous running of the line;

    28.2. The purpose of the cure notice was to demand cure compliance from DMRC. As long as 'effective steps' were taken by DMRC, culminating in cure compliance under the statutory process under the Metro Railways (Operation and Maintenance) Act, 2002[19], the termination notice was invalid;

    28.3. Clause 29.5.1 of the agreement shows that the termination ought to have been effected after 90 days from the cure notice plus 90 days in addition. Termination was thus effective only on 07 January 2013 and on this date, none of the defects were pending to be rectified by DMRC;

19 The 2002 Act

28.4. The sanction/certificate granted by CMRS was issued on a joint application by both the parties after thorough inspection of the operations. The terms of the agreement and the provisions relating to the CMRS process under the 2002 Act are intrinsically connected;

28.5. The Tribunal should have considered the binding effect of the CMRS sanction as the issue of speed was neither raised, nor deliberated before it and was irrelevant to the termination;

28.6. The line has been running since 1 July 2013. The speed of operations was sanctioned at 50kmph, and has been progressively increased to 60 kmph in January 2013, 80 kmph in August 2013, 90 kmph in July 2019, and ultimately 100 kmph and then 110 kmph in 2023. The metro was running at 80 kmph prior to the termination of the agreement. It is currently running at 120kmph for which a fresh sanction was obtained from the CMRS. The smooth operation of the metro line for five and a half years, until the date of the award was entirely ignored by the Tribunal, making the award perverse;

28.7. The running of the metro line shows that even if there were defects, they did not render the metro unviable nor did they interfere with DAMEPL's obligations under the agreement. Thus, the award is perverse and patently illegal;

28.8. The tribunal ignored vital evidence, warranting the High Court's interference under Section 37 of the Arbitration Act. The miscarriage of justice principle is informed by the scheme of the Arbitration Act;

28.9. The High Court's interference with the patent illegality was justified and this Court under Article 136 ought to have been slow to interfere with the decision of the Division Bench of the high Court. Miscarriage of justice in terms of the decision in **Rupa Hurra vs. Ashok Hurra**[20] is linked with patent illegality. The High Court's interference under Section 37 was justified because the exercise of jurisdiction under Section 34 was erroneous; and

28.10. The issue of the fitness of the line was a matter falling under the 2002 Act under which the Commissioner was the final

20 [2002] 2 SCR 1006 : 2002 4 SCC 388

authority to decide on the safety of the metro. The certificate could not have been substituted by the Tribunal's finding on safety of the line.

29. We have heard Mr Harish Salve, Mr Kapil Sibal, Mr JJ Bhatt and Mr Prateek Seksaria, learned senior counsel for the respondent. They have made the following submissions:

29.1. The curative petition is not maintainable as this Court cannot revisit the conclusions arrived at by the Tribunal;

29.2. DMRC has taken over the project and has been operating it since 01 July 2012 without having paid for its operation between 01 January 2013 till 30 June 2013, except for a small fraction of the total awarded amount;

29.3. Till early March 2023, the trains were running at 90kmph, as opposed to the speed of 120kmph at which they ought to have been running;

29.4. The issue about the relevance of the CMRS certificate has been squarely addressed by the Single Judge and this Court. The arbitrator is the sole judge of the quality and the quantity of evidence;

29.5. The award was made after 68 hearings and after consideration of 35,000 pages of documents and oral evidence. It has been two and a half years since this Court restored the award on 09 September 2021 and the review against this decision was dismissed on 23 November 2021;

29.6. According to the decision in **Rupa Hurra** (supra), the court is not supposed to sit over a judgment like a court of appeal. The scope of the review jurisdiction is narrow in itself and does not warrant rehearing and correction of a judgment. Curative proceedings cannot be treated as a second review; and

29.7. DAMEPL is not unjustly enriching itself. DAMEPL completed the project with an investment of Rs 2802 Crores comprising of debt and equity contributions and it continued to service the debt even after handing over the line to DMRC. DMRC on the other hand, has paid the decretal amount of Rs 2599.18 Crores while Rs 5088 Crores under the decree is outstanding as on 31 January 2024.

G. Analysis

I. Curative Jurisdiction may be invoked if there is a miscarriage of justice

30. Senior Counsel for the respondent set forth preliminary objections challenging the maintainability of the Curative Petition, in view of the scope of that jurisdiction delineated *inter alia* in the decision in **Rupa Hurra** (supra) We will first lay down the contours of the jurisdiction of this Court to entertain a curative petition in exercise of its inherent powers under Article 142.

31. In **Rupa Hurra** (supra), a Constitution Bench of this Court dwelt on whether any relief is available against a final judgement of this Court after the dismissal of a petition seeking review of the judgement. Two opinions were authored. The main judgment was by Justice Syed Shah Quadri (on behalf of Chief Justice S P Bharucha, Justice Variava, Justice Shivraj Patil and himself). A concurring opinion was authored by Justice U C Banerjee.

32. Justice Quadri observed that the concern of the Court for rendering justice in a cause cannot be considered less important than the principle of finality. There are certain situations, the opinion observed, which would require reconsideration of a final judgement even after the review has been dismissed to set right a miscarriage of justice. Such circumstances, the court held, are those where declining to reconsider the judgement would be oppressive to judicial conscience and cause the perpetuation of irremediable injustice. Justice Quadri observed:

> "**42. …** the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment as though it is essentially in the public interest that a final judgment of the final court in the country should not be open to challenge, **yet there may be circumstances, as mentioned above, wherein declining to reconsider the judgment would be oppressive to judicial conscience and would cause perpetuation of irremediable injustice.**"
>
> (emphasis supplied)

33. This Court laid down an overarching principle that the Court may entertain a curative petition to (i) prevent abuse of its process; and

(ii) to cure a gross miscarriage of justice.[21] The Court provided examples of such circumstances, such as a violation of the principles of natural justice; or a situation where the Judge fails to disclose his connection with the subject matter or the parties, giving scope for an apprehension of bias. However, the Court observed that it is not possible to exhaustively enumerate the grounds on which a curative petition may be entertained. The Court noted as follows:

> "50. The next step is to specify the requirements to entertain such a curative petition under the inherent power of this Court so that floodgates are not opened for filing a second review petition as a matter of course in the guise of a curative petition under inherent power. It is common ground that except when very strong reasons exist, the Court should not entertain an application seeking reconsideration of an order of this Court which has become final on dismissal of a review petition**. It is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained.**
>
> 51. Nevertheless, we think that 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 a 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."

34. The enumeration of the situations in which the curative jurisdiction can be exercised is thus not intended to be exhaustive. The Court went on to lay down certain procedural requirements to entertain a curative petition such as a certificate by a Senior Advocate about fulfilling of the requirements.

35. In his concurring opinion, Justice Banerjee also laid down a similar test of 'manifest injustice' to exercise the jurisdiction of this Court

21 Rupa Hurra, para 49.

under Article 142 while entertaining a curative petition. In essence, the jurisdiction of this Court, while deciding a curative petition, extends to cases where the Court acts beyond its jurisdiction, resulting in a grave miscarriage of justice. We now proceed to lay down the scope of jurisdiction of this Court and the competent courts below while dealing with cases arising out of an application to set aside an arbitral award under Section 34 of the Arbitration Act.

II. Scope of interference of courts with arbitral awards

36. Section 34 of the Arbitration Act delineates the grounds for setting aside an arbitral award. The provision, as amended by the Arbitration and Conciliation (Amendment) Act, 2015 reads as follows:

> "34. Application for setting aside arbitral award.—
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> …
>
> (2) An arbitral award may be set aside by the Court only if—
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> …
>
> (b) the Court finds that--
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
>
> (ii) the arbitral award is in conflict with the public policy of India.
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> Explanation 1. --For the avoidance of any doubt, it is clarified that an 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.

(2A) **An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:**

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."

(emphasis supplied)

37. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by 'patent illegality' appearing on the face of the award.

38. In **Associate Builders vs. Delhi Development Authority**[22], a two-judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are (i) based on no evidence; (ii) based on irrelevant material; or (iii) ignores vital evidence. Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be

22 [2014] 13 SCR 895 : 2015 3 SCC 49.

described as unreasoned. A fundamental breach of the principles of natural justice will result in a patent illegality, where for instance the arbitrator has let in evidence behind the back of a party. In the above decision, this Court observed:

> "**31.** The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:
>
> (i) a finding is based on no evidence, or
>
> (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
>
> **(iii) ignores vital evidence in arriving at its decision,**
>
> such decision would necessarily be perverse.
>
> …
>
> 42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example **if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside**."
>
> (emphasis supplied)

39. In **Ssangyong Engineering & Construction Co. Ltd. vs. NHAI**[23], a two-judge bench of this Court endorsed the position in **Associate Builders** (supra), on the scope for interference with domestic awards, even after the 2015 Amendment:

> "**40.** The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders*, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, **unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the**

23 [2019] 7 SCR 522 : 2019 15 SCC 131

> **contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).**
>
> **41.** … **Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.** Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."
>
> (emphasis supplied)

40. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.[24] A 'finding' based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of 'patent illegality'. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice.

41. A judgment setting aside or refusing to set aside an arbitral award under Section 34 is appealable in the exercise of the jurisdiction of the court under Section 37 of the Arbitration Act. It has been clarified by this Court, in a line of precedent, that the jurisdiction under Section 37 of the Arbitration Act is akin to the jurisdiction of the Court under Section 34 and restricted to the same grounds of challenge as Section 34.[25]

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24 Patel Engineering Limited vs North Eastern Electric Power Corporation Limited (2020) 7 SCC 176.

25 MMTC Ltd. v. Vedanta Ltd, (2019) 4 SCC 163, para 14; Konkan Railways v. Chenab Bridge Project Undertaking, 2023 INSC 742, para 14.

42. In the statutory scheme of the Arbitration Act, a recourse to Section 37 is the only appellate remedy available against a decision under Section 34. The Constitution, however, provides the parties with a remedy under Article 136 against a decision rendered in appeal under Section 37. This is the discretionary and exceptional jurisdiction of this Court to grant Special Leave to Appeal. In fact, Section 37(3) of the Arbitration Act expressly clarifies that no second appeal shall lie from an order passed under Section 37, but nothing in the section takes away the constitutional right under Article 136. Therefore, in a sense, there is a third stage at which this court tests the exercise of jurisdiction by the courts acting under Section 34 and Section 37 of the Arbitration Act.

43. While adjudicating the merits of a Special Leave Petition and exercising its power under Article 136, this Court must interfere sparingly and only when exceptional circumstances exist, justifying the exercise of this Court's discretion.[26] The Court must apply settled principles of judicial review such as whether the findings of the High Court are borne out from the record or are based on a misappreciation of law and fact. In particular, this Court must be slow in interfering with a judgement delivered in exercise of powers under Section 37 unless there is an error in exercising of the jurisdiction by the Court under Section 37 as delineated above. Unlike the exercise of power under Section 37, which is akin to Section 34, this Court (under Article 136) must limit itself to testing whether the court acting under Section 37 exceeded its jurisdiction by failing to apply the correct tests to assail the award.

III. The award was patently illegal

44. In the case at hand, the Division Bench found the award to be perverse, irrational and patently illegal since it ignored the vital evidence of CMRS certification in deciding the validity of termination. This, the Division Bench held, overlooked the statutory certification deeming it irrelevant without reasons and thus the award was patently illegal according to the test in **Associate Builders** (supra).[27]

26 Chandi Prasad Chokhani v. State of Bihar, AIR 1961 SC 1708; Pritam Singh v. State, 1950 SCC 189.

27 Division Bench, paras 98-99.

45. This Court in appeal against the judgment of the Division Bench of the High Court held that the award was not perverse. Factual findings such as the finding that the cure period was 90 days and that DAMEPL was entitled to terminate the contract, could not, it was held, be interfered with.[28] On the CMRS Certificate, this Court held that the arbitral tribunal was deciding whether there was a breach of the agreement and whether the defects were **cured** within the cure period; hence the safety of the line was not an issue before the tribunal. This Court held that the Commissioner may be the competent authority to determine the safety of the project but the certificate itself did not show that the defects were **cured** within 90 days. This Court disagreed with the Division Bench and held that the CMRS certificate had no bearing on the validity of the termination.

46. There is a fundamental error in the manner in which this Court dealt with the challenge to the decision of the High Court. This jurisdiction of this Court was invoked under Article 136 of the Constitution. The Court was exercising its jurisdiction over a decision rendered by the Division Bench of the High Court in appeal under Section 37. The Division Bench had held that the award overlooked crucial facts and evidence on record that were crucial to the determination of the issues before the arbitral tribunal. This led to the award being perverse and patently illegal within the parameters of Section 34 as explained in the judgments of this Court in **Associate Builders** (supra) and **Ssangyong** (supra). The award overlooked the express terms of clause 29.5.1(i) which stipulated that if "effective steps" were taken during the cure period by DMRC, the contractual power to terminate could not be exercised. This Court incorrectly considered the CMRS certificate to be irrelevant to the validity of the termination.

i. Interpretation of the termination clause by the Tribunal was unreasonable

47. Interference with an arbitral award cannot frustrate the '*commercial wisdom behind opting for alternate dispute resolution*', merely because an alternate view exists.[29] However, the interpretation of a contract cannot be unreasonable, such that no person of ordinary prudence would take it. The contract, which is a culmination of the parties'

28 Civil Appeal, para 31.

29 Dyna Technologies Private Limited v. Crompton Greaves Limited, (2019) 20 SCC 1, paras 24, 25.

agency, should be given full effect. If the interpretation of the terms of the contract as adopted by the tribunal was not even a possible view, the award is perverse.[30]

48. Clause 29.5.1(i) entitles the concessionaire to terminate the agreement if DMRC "failed to cure such breach or take effective steps for curing such breach" within the cure period. Pertinently, the clause uses two separate phrases, "cure" and "effective steps to cure". The clause reads as follows:

> "29.5.1 The Concessionaire may after giving 90 (ninety) days' notice in writing to DMRC terminate this Agreement upon the occurrence and continuation of any of the following events (each a "DMRC Event of Default"), unless any such DMRC Event of Default has occurred as a result of Concessionaire Event of Default or due to a Force Majeure Event.
>
> (i) DMRC is in breach of this Agreement and such breach has a Material Adverse Effect on the Concessionaire and DMRC has **failed to cure such breach or take effective steps for curing such breach** within 90 (ninety) days of receipt of notice in this behalf from the Concessionaire;"
>
> (emphasis supplied)

49. The Tribunal found that since certain defects remained after the cure period, this was indicative of the fact that the defects were not cured and that no effective steps were taken. However, logically, the fact that defects existed at the end of the cure period relates to one aspect of the termination clause – that the defects were not *completely* cured. It does not explain whether effective steps were taken within the cure period. Effectively, the Tribunal considered that in-progress steps that had not yet culminated into completely cured defects were not "effective steps" to offset termination. This places the two components i.e. 'curing of defects' and 'taking effective steps to cure defects' at par, to mean that only the completed curing of defects is relevant. The Tribunal fails to explain what amounts to an 'effective step' and how the steps taken by DMRC were not effective, within the meaning of the phrase.

30 Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking, 2023 9 SCC 85.

50. Evidently, this could not have been the intention of the parties, because they have clearly agreed to include the phrase "effective steps". They clearly intended that once a cure notice was served on a party, it would be open to them to either cure defects or to initiate effective steps, even if they could not culminate into the complete curing of defects within the cure period. Incremental progress, even if it does not lead to complete cure, is an acceptable course of action to prevent termination according to the 2008 Agreement.

51. The Tribunal did not appreciate the individual import of the two phrases separately from each other. This was not a matter of mere "alternate interpretation" of the clause, but an unreasonable and uncalled for interpretation of the clause, which frustrated the very provision, and which no reasonable person would have accepted considering the terms of the clause. We must clarify that Tribunal could have still arrived at the conclusion that the steps taken during the cure period were not effective within the meaning of the clause for certain reasons. However, such discussion and reasoning is conspicuously absent.

52. Issue H framed by the Tribunal- "*Did the issuance of certificate by CMRS show that the defects were duly cured*" similarly glosses over the effective steps aspect of the clause. Given this framing, the issue was bound to be answered in the negative since the CMRS certificate does not conclude that the defects were completely cured.

53. The decisions of the Single Judge and this Court are similarly silent on the aspect of "effective steps". In paragraphs 31 to 34 of its judgment, this Court noted that since the defects were *not cured* in 90 days, the termination was valid. Impliedly, this Court found that the defects ought to have been **fully** cured within the cure period in order to avoid termination.

54. The judgment of this Court also never tested the relevance of the CMRS certificate vis-à-vis "effective steps". This Court accepted a reading of the termination clause by the Arbitral tribunal and the Single Judge that was not even a possible view and could not have been arrived at on any objective assessment. This Court not only overlooked the plain words of the clause but also rendered the phrase "effective steps" otiose.

ii. The award overlooked vital evidence and matters on the record

55. The erroneous and misleading framing of the issue as noted above led to the ignoring of vital evidence relevant to the issue of termination. The arbitral tribunal held that since the Commissioner imposed conditions of inspection and speed restrictions, this meant that the defects were not fully cured.

56. Certainly, the imposition of conditions shows that the defects were not cured completely, to warrant an unconditional sanction for full speed operations. However, as the Division Bench of the High Court correctly observed, the separation of the validity of termination and relevance of the CMRS certificate was the reason for this erroneous finding. Since the 'effective steps' aspect was overlooked, the CMRS certificate was erroneously deemed to be irrelevant.

57. On 19 November 2012, a joint application was made by the parties to the Commissioner under the 2002 Act. Significantly, the annexure to the application which was jointly signed by the parties states as set out below:

> "f) **The repairs have been Inspected by an Independent Engineer M/s TUV, engaged by**
>
> **DMRC to conduct the technical check on the quality of work and to ensure that the repairs are carried out as per the approved repair methodology**. The copies of the certificates obtained from TUV are enclosed as Annexures xvii.
>
> g) Cracks in soffit of some 'U' girders were also observed and, therefore, inspection of all the girders have been done and mapping of the cracks have been undertaken accordingly (Annexure-xviii). Cracks have beery noticed in 367 girders. These cracks were analysed by M/s SYSTRA and their report is, enclosed as Annexure xix. **They have concluded that there is no effect on the integrity of the girders and that there is no reason to-be further worried**. M/s SYSTRA have also given the repair methodology for these cracks from the point of view of durability and to avoid permeation of water during the service life of girders, (Included in Annexure-xvi). Accordingly, the cracks wider than 0.2 mm have been

> Injected with epoxy resin and cracks less than 0.2 mm have been sealed with epoxy sealant.
>
> h) **Train trials after repairs by DMRC have been completed successfully and all systems have been checked for correct functioning at various speeds Including at speed of 120 kmph.** Track recording was done with OMS-2000 during these trials and no peak of value ≥ 0.15g was recorded upto 120 Kmph (results of OMS 2000 are enclosed in Annexure XIV)"
>
> (emphasis supplied)

58. Admittedly, some of the defects were cured in their entirety and steps were taken by DMRC to cure the remainders, based on which the parties had jointly sought permission under the 2002 Act. The parties stated that the repairs had been inspected by an independent engineer; an analysis of the cracks revealed that the integrity of the girders was intact and there was no cause of concern. Further, the parties stated that the train trials "after repairs by DMRC have been completed successfully and all systems have been checked for correct functioning at various speeds including the speed of 120kmph". It is apparent on the face of the record that certain repairs were completed by DMRC and the trials had been completed at full speed as on the date of application, 19 November 2012.

59. On 9 July 2012, about four months before the date of the joint application, DAMEPL had averred in the cure notice that the project was not 'safe for operations' and that it posed a threat to life and property. The arbitral tribunal was correct in concluding that the joint application does not constitute a waiver of the termination, but this evidence was vital considering the change in DAMEPL's position on the safety of the line from the date of the cure notice to the date of the joint application. DMRC did take certain steps to alleviate DAMEPL's concerns so as to warrant this change of position. There is no explanation forthcoming in the award about why none of these steps initiated during the cure period were 'effective steps'**.** This gap in reasoning stems from the arbitral tribunal wrongly separating the issue of termination and the CMRS certificate.

60. Besides the effective steps aspect, there is another reason why the CMRS certificate ought to have been treated as relevant. The Tribunal treats the cure notice as a crucial document**.** At paragraph 26 of the

award, it noted that *"since the cure notice dated 9th July 2012 is a crucial document in this case, it is useful to quote certain paragraphs of the said letter"*. The cure notice, in turn, was heavily premised on the safety of operations.[31] Interestingly, at paragraph 27 of the cure notice, DAMEPL avers that the trains can ***only*** be operated once the defects are cured to the satisfaction of the stakeholders about the safety of operations.

61. Reference may be made to the 2002 Act under which the CMRS is the relevant statutory stakeholder whose satisfaction about the safety of operations is necessary for running of the metro. The relevant provisions of the Act may be adverted to here:

> "**14. Sanction of Central Government to the opening of metro railway**.—The metro railway in the the National Capital Region, metropolitan city and metropolitan area shall not be opened for the public carriage of passengers except with the previous sanction of the Central Government.
>
> **15. Formalities to be complied with before giving sanction to the opening of metro railway.**—(1) The Central Government shall, before giving its sanction to the opening of the metro railway under Section 14, obtain a report from the Commissioner that—
>
> (a) he has made a careful inspection of the metro railway and the rolling stock that may be used thereon;
>
> (b) the moving and fixed dimensions as laid down by the Central Government have not been infringed;
>
> (c) the track structure, strength of bridges, standards of signalling system, traction system, general structural character of civil works and the size of, and maximum gross load upon, the axles of any rolling stock, comply with the requirements laid down by the Central Government; and
>
> (d) in his opinion, metro railway can be opened for the public carriage of passengers without any danger to the public using it.

31 Cure Notice paras 18,21,26, and 27.

(2) If the Commissioner is of the opinion that the metro railway cannot be opened without any danger to the public using it, he shall, in his report, state the grounds therefor, as also the requirements which, in his opinion, are to be complied with before sanction is given by the Central Government.

(3) The Central Government, after considering the report of the Commissioner, may sanction the opening of the metro railway under Section 14 as such or subject to such conditions as may be considered necessary by it for the safety of the public.

18. Power to close metro railway opened for public carriage of passengers.—Where, after the inspection of the metro railway opened and used for the public carriage of passengers or any rolling stock used thereon, the Commissioner is of the opinion that the use of the metro railway or of any rolling stock will be attended with danger to the public using it, the Commissioner shall send a report to the Central Government who may thereupon direct that—

(i) the metro railway be closed for the public carriage of passengers; or

(ii) the use of the rolling stock be discontinued; or

(iii) the metro railway or the rolling stock may be used for the public carriage of passengers subject to such conditions as it may consider necessary for the safety of the public.

21. Delegation of powers.—The Central Government may, by notification, direct that any of its powers or functions under this chapter, except power to make rule under Section 22, shall, in relation to such matters and subject to such conditions, if any, as may be specified in the notification, be exercised or discharged also by the Commissioner."

62. In essence, the scheme of the 2002 Act, provides that no metro line will operate except with the previous sanction of the Central

Government.[32] Before granting the sanction, the Central Government has to obtain a report from the Commissioner that (inter alia) the latter has carefully inspected the metro railway, the general structure of civil works and that in their opinion, the metro railway can be opened for passengers without any danger to the public.[33] The Central Government may sanction the opening of the line as such or subject to conditions it considers necessary for public safety.[34] If the Commissioner is of the opinion that the use of the metro will "attend danger to the public using it", they may send a report to the Central Government, which may in turn direct that the metro be closed or may be open for public carriage only subject to certain conditions.[35] The powers of the Central Government may be delegated to the Commissioner.[36]

63. The structure and safety of the project, as certified by the CMRS, were thus relevant before the Tribunal, making the CMRS certificate a vital piece of evidence in deciding the issue. The CMRS certificate was relevant evidence about the safety of the structure. Considering the statutory scheme of the 2002 Act, especially Section 15, the Tribunal erred in deeming the sanction irrelevant to its central issue – which was the validity of the termination, which, according to the cure notice, was premised on safety.

64. Overall, the cure notice places great emphasis on the safety of the passengers, which, they claimed stood compromised by defects, justifying discontinuation of operations. This issue falls directly within the domain of the Commissioner under the scheme of the 2002 Act.

65. Rather than considering the vital evidence of the CMRS certificate towards safety and effective steps, the arbitral tribunal focussed on the conditions imposed by the Commissioner on speed and regarding inspections. While the Division Bench correctly noted that the certificate was relevant for the issue of the validity of termination, this Court held that safety was not in issue, even though DAMEPL insisted on discontinuing operations citing safety concerns. We respectfully

32 Section 14, Metro Railways (Operations and Maintenance) Act 2002.

33 Section 15, ibid.

34 Section 15(3), ibid.

35 Section 18, ibid.

36 Section 21, ibid.

disagree with this Court's re-assessment of the Division Bench's interpretation. The cure notice was relevant for the reasons stated above. Moreover, the fact that DAMEPL premised it on safety could not have been overlooked by the Tribunal. In doing so, it overlooked vital evidence pertaining to an issue that goes to the root of the matter. The cure notice was obviously on the record and merited consideration for its contents bearing on vital elements of safety.

66. The cure notice, which contains statements bearing on the safety of the line and other material indicating that the line was running uninterrupted are matters of record. While the cure notice contains allegations about the line not being operational, there is evidence on the record indicating that the line was in fact running. Even if we were to accept that the finding of the arbitral tribunal that the defects were not completely cured during the cure period is a factual finding incapable of interference, it is clear from the record that DMRC took steps towards curing defects which led to the eventual resumption of operations. The award contains no explanation as to why the steps which were taken by DMRC were not 'effective steps' within the meaning of the termination clause.

67. In essence, therefore the award is unreasoned on the above important aspects. It overlooks vital evidence in the form of the joint application of the contesting parties to CMRS and the CMRS certificate. The arbitral tribunal ignored the specific terms of the termination clause. It reached a conclusion which is not possible for any reasonable body of persons to arrive at. The arbitral tribunal erroneously rejected the CMRS sanction as irrelevant. The award bypassed the material on record and failed to reconcile inconsistencies between the factual averments made in the cure notice, which formed the basis of termination on the one hand and the evidence of the successful running of the line on the other. The Division Bench correctly held that the arbitral tribunal ignored vital evidence on the record, resulting in perversity and patent illegality, warranting interference. The conclusions of the Division Bench are, thus, in line with the settled precedent including the decisions in **Associate Builders** (supra) and **Ssangyong** (supra).

H. Conclusion

68. The judgment of the two-judge Bench of this Court, which interfered with the judgment of the Division Bench of the High Court, has resulted

in a miscarriage of justice. The Division Bench applied the correct test in holding that the arbitral award suffered from the vice of perversity and patent illegality. The findings of the Division Bench were borne out from the record and were not based on a misappreciation of law or fact. This Court failed, while entertaining the Special Leave Petition under Article 136, to justify its interference with the well-considered decision of the Division Bench of the High Court. The decision of this Court fails to adduce any justification bearing on any flaws in the manner of exercise of jurisdiction by the Division Bench under Section 37 of the Arbitration Act. By setting aside the judgement of the Division Bench, this Court restored a patently illegal award which saddled a public utility with an exorbitant liability. This has caused a grave miscarriage of justice, which warrants the exercise of the power under Article 142 in a Curative petition, in terms of **Rupa Hurra** (supra).

69. The Curative petitions must be and are accordingly allowed. The parties are restored to the position in which they were on the pronouncement of the judgement of the Division Bench. The execution proceedings before the High Court for enforcing the arbitral award must be discontinued and the amounts deposited by the petitioner pursuant to the judgment of this Court shall be refunded. The part of the awarded amount, if any, paid by the petitioner as a result of coercive action is liable to be restored in favour of the petitioner. The orders passed by the High Court in the course of the execution proceedings for enforcing the arbitral award are set aside.

70. Before concluding, 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.

71. 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 come to the conclusion that the arbitral award suffered from perversity and patent illegality. There was no valid basis for this Court to interfere under Article 136 of the Constitution. The interference by this Court has resulted in restoring a patently illegal award. This has caused a grave miscarriage of justice. 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.

72. The curative petitions are allowed in the above terms.

73. Pending applications, if any, stand disposed of.

Headnotes prepared by: Ankit Gyan

Result of the case:
Curative petitions allowed.