EDITORIAL NOTE

THE CURIOUS CASE OF A CURATIVE: A CONTRARIAN REFLECTION ON THE ARBITRAL AWARD SET ASIDE IN *DMRC* V. *DAMEPL*

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This year, the Supreme Court of India ('SCI') chose to allow a curative petition in Delhi Metro Rail Corporation *v.* Delhi Airport Metro Express *('DMRC Judgment') to set aside a disputed arbitral award. The decision is momentous as it marks the first arbitral award set aside at the curative stage, which is the final stage of review our Apex Court offers. This invites our attention to revisit and inspect judgments involving curative petitions to cull out the parameters the SCI considers before allowing one. Such an analysis would allow us to check whether the curative petition in the DMRC Judgment passed this threshold to be allowed. This is necessary as the DMRC Judgment has courted much criticism in its few months of existence. While most have directed their dissatisfaction at the increased ambit of setting aside arbitral awards, this note solely takes a look at it from a 'curative' perspective. It will restrict itself to tallying the DMRC Judgment against the other curative petitions that have been allowed by the SCI. In doing so, it might end up providing a contrarian view to the current discourse surrounding the decision.*

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I. INTRODUCTION

The Delhi Metro Rail Corporation ('DMRC') chose to file a curative petition against the dismissal of its review petition seeking to set aside an arbitral award against itself.[1] This INR 7687 crore award was passed in favour of Delhi Airport Metro Express Pvt. Ltd.

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[1] Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd., 2024 SCC OnLine SC 522 ('DMRC Judgment'), ¶16.

('DAMEPL') in August 2013.[2] This curative petition was allowed, and the disputed arbitral award was set aside or annulled.[3]

This decision of the Supreme Court of India ('SCI') in the DMRC v. DAMEPL ('DMRC Judgment') has been the subject of much scrutiny.[4] This is reasonably expected as a curative petition of such nature had never been allowed before.[5] A majority of such scrutiny relates to viewing the DMRC Judgment through an arbitral lens.[6]

This brief note aims to make a novel contribution to the existing discussion by undertaking a two-fold exercise. *First*, Part II will attempt to determine whether the SCI relies on a fixed set of factors when allowing curative petitions. This will involve taking a look at all curative petitions that have been allowed by the Apex Court. Additionally, it would also look at curative petitions that have been dismissed but have indicated these factors. *Second*, Part III will analyse the facts of the DMRC Judgment to determine whether any of these delineated factors are present. A conscious effort will be made throughout this two-part endeavour not to stray into arbitral jurisprudence, an exercise that has been undertaken by others at length. Finally, Part IV of the note will provide a few concluding thoughts.

II. WHAT DOES IT TAKE FOR A CURATIVE PETITION TO BE ALLOWED?

The curative jurisdiction of the SCI under Articles 129 and 142 allows it to correct its own judgements even after the dismissal of a review petition for dispensing justice.[7] In the presence of such exemplary powers, any final judgment of the SCI may be subjected to further scrutiny. However, the SCI is expected to exercise its curative powers with the utmost circumspection, allowing deviations from the rule of finality only in the rarest of rare situations.[8] To date, only five curative petitions, including the DMRC Judgment, have been allowed by the SCI.[9]

The first sub-section delves into the other four cases and the circumstances in which the SCI accepted these petitions. Subsequently, the authors endeavour to highlight a few

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[2] DMRC Judgment, *supra* note 1, ¶13; Krishnadas Rajagopal, *SC quashes ₹7687-crore Arbitral Award against DMRC's DAMEPL as 'Patently Illegal'*, THE HINDU, April 11, 2024, available at https://www.thehindu.com/news/cities/Delhi/supreme-court-lifts-4700-cr-burden-off-dmrc-criticises-its-own-2021-verdict/article68049360.ece (Last visited on October 11, 2024).

[3] DMRC Judgment, *supra* note 1, ¶¶71, 72.

[4] Madhav Goel & Anjali Sharma, *The Debate Over Supreme Court's Curative Intervention in Arbitration*, INDIACOPRLAW, July 6, 2024, available at https://indiacorplaw.in/2024/07/the-debate-over-supreme-courts-curative-intervention-in-arbitration.html (Last visited on October 11, 2024).

[5] *See infra* Part II.A on "Accepted Petitions" (the decisions analysed here comprise all the curative petitions that have been allowed by the SCI to the best of the authors' knowledge).

[6] Rishabh Gandhi, *Beyond the Verdict: The Long-Term Impact of DMRC vs. DAMEPL on Indian Arbitration*, BAR AND BENCH, July 6, 2024, available at https://www.barandbench.com/law-firms/view-point/beyond-the-verdict-long-term-impact-of-dmrc-vs-damepl-indian-arbitration (Last visited on October 11, 2024); Animesh Upadhyay & Siddharth S. Dubey, *DMRC vs DAMEPL: SC broadens Scope of Court Intervention in Arbitral Awards*, BUSINESS STANDARD, April 25, 2024, available at https://www.business-standard.com/economy/analysis/dmrc-vs-damepl-sc-broadens-scope-of-court-intervention-in-arbitral-awards-124042500126_1.html (Last visited on October 11, 2024); Brigitta John Vallickad, *One More Bite, Please? Indian Supreme Court Sets Aside Arbitral Award in Exercise of its Curative Jurisdiction*, GLOBAL ARBITRATION NEWS, May 28, 2024, available at https://www.globalarbitrationnews.com/2024/05/28/one-more-bite-please-indian-supreme-court-sets-aside-arbitral-award-in-exercise-of-its-curative-jurisdiction/ (Last visited on October 11, 2024); *See* Srividhya Ragavan & Niraj K. Seth, *Special Challenges in Execution of Arbitral Awards in Public Private Partnerships*, Vol. 35(1), NATIONAL L. SCHOOL OF INDIA REV., (2023).

[7] The Constitution of India, 1950, Art. 129, 142; Rupa Hurra v. Ashok Hurra, (2002) 4 SCC 388.

[8] Rupa Hurra v. Ashok Hurra, (2002) 4 SCC 388, ¶42 ('Rupa Hurra').

[9] This is to the best of the authors' knowledge.

select instances of other petitions to gather more context surrounding the possible allowance of one. After having provided an insight into the practice of acceptance and rejection of such petitions, in the last sub-section, the authors shall attempt to identify broad parameters that were recognised by the SCI while accepting and dismissing these petitions to create a reliable framework within which the curative powers of the SCI may be understood to function.

A. ACCEPTED PETITIONS

In *Latoori Singh* v. *State of Uttar Pradesh*,[10] the SCI condemned the dismissal of a review petition which was supposedly barred by limitation. The court was of the opinion that the petitioner is entitled to the relaxations enforced with respect to the limitation act due to COVID-19.[11] COVID-19 was categorised as an external debilitating situation because of which an individual may not be able to keep up with procedural deadlines due to no fault of their own.[12]

In *Navneet Kaur* v. *State of NCT Delhi* ('Navneet Kaur'),[13] the court was called upon to adjudicate upon a curative petition seeking commutation of a death penalty into life imprisonment. After having appraised the facts of the case, the court accepted the petition. It categorised the inordinate delay of eight years in the disposal of the mercy petition and the dire mental state of the petitioner as two supervening circumstances presenting a compelling case for commutation and accordingly allowed the petition.[14]

Procedural lapses have also been recognised as grounds for accepting curative petitions. The importance of appreciating relevant evidence before reaching substantive conclusions regarding the guilt of the accused was underscored by the SCI in the case of *National Commission for Women* v. *Bhaskar Lal Sharma* ('National Commission for Women').[15] The court observed that a summons issued by the competent authorities cannot be quashed on the basis of a superficial understanding of the matter at hand.[16] In this specific case, the trial was pending commencement, and the evidence had yet to be evaluated.[17] The orders were issued, summoning the accused to stand trial. In the eyes of the court, it was too early to draw such drastic conclusions regarding the summons so issued.[18]

The court was yet again called upon to exercise its curative jurisdiction in *Interplay between Arbitration Agreements Under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899; In Re*.[19] The court here merely accepted a plea for reference to a larger bench of the SCI along with a few other contentious cases.[20] Accordingly, this case is not an example of a 'true' curative petition which was allowed. It does not comment on the nature and exercise

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[10] Latoori Singh v. State of Uttar Pradesh, 2024 SCC OnLine SC 590, ¶4.
[11] *Id.*, ¶4.
[12] Cognizance for extension of limitation, In Re, 2020 SCC OnLine SC 343, ¶2; Cognizance for extension of limitation, In Re, 2020 SCC OnLine SC 434, ¶2.
[13] Navneet Kaur v. State of NCT Delhi, (2014) 7 SCC 264 ('Navneet Kaur').
[14] *Id.*, ¶12.
[15] National Commission for Women v. Bhaskar Lal Sharma, (2014) 4 SCC 252 ('National Commission for Women').
[16] *Id.*, ¶12.
[17] *Id.*, ¶5
[18] *Id.*
[19] Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re, 2023 SCC OnLine SC 1666.
[20] *Id.*, ¶ 31.

of such curative powers. Accordingly, the authors do not draw any principles from this judgment for the purposes of our discussion.

B. OTHER PETITIONS

This portion of the paper looks at a select few cases wherein the SCI provided valuable insight into which curative petitions may be accepted. The curative powers of the SCI were 'created' in *Rupa Hurra* v. *Ashok Hurra* ('Rupa Hurra').[21] The question central to the discussion was whether there is any recourse available to an individual against the decision of the SCI after the dismissal of a petition seeking review of the judgement. In an attempt to balance the scales, the SCI observed that in a few situations, the principle of finality may prove to be subservient to the greater cause of ensuring fairness by setting right a miscarriage of justice.[22]

The apex court laid down the following two parameters on the basis of which a curative petition may be entertained: (1) to prevent abuse of its process and (2) to cure a gross miscarriage of justice.[23] The court further observed that an aggrieved must be provided relief if he is able to establish a violation of the principles of natural justice.[24] The court mentioned that the grounds laid down by it are in no way exhaustive; they are illustrative in nature.[25]

The SCI provided further clarity on the boundaries of its curative jurisdiction in the case of *Union of India* v. *Union Carbide Corporation*.[26] The court, while rejecting the curative petition in this case, observed that a curative petition may be entertained in situations involving a gross miscarriage of justice, fraud or suppression of material facts.[27]

After having conducted the aforementioned empirical analysis, the authors shall, in the subsequent section, cull out broad guiding principles.

C. DELINEATING A FRAMEWORK

The broad purpose behind accepting curative petitions, as was very succinctly put forth in Rupa Hurra, is to cure a gross "miscarriage of justice" and an "abuse of its process".[28] However, these terms are inherently ambiguous and open to diverse interpretations. The reasons outlined by the SCI in the past for accepting and dismissing such petitions serve as a guidepost for us to understand the parameters that fit this description. They have nearly entirely relied on the unique factual circumstance in each case to cure a "miscarriage of justice".

From the cases discussed above, the following parameters can be extracted: (1) Inordinate delays (in specific circumstances); (2) Procedural lapses, including non-appreciation of evidence impacting the fairness of the trial; (3) Relaxation of procedural timelines due to debilitating external circumstances; (4) Violation of the principles of natural justice. The parameters mentioned above serve as reliable metrics. The existence of such a broad framework will enable us to test the decision of the SCI in the DMRC case against these parameters.

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[21] Rupa Hurra, *supra* note 8.
[22] *Id.*
[23] *Id.*, ¶ 49.
[24] *Id.*, ¶ 51.
[25] *Id.*
[26] Union of India v. Union Carbide Corpn., 2023 SCC OnLine SC 264.
[27] *Id.*, ¶ 47.
[28] Rupa Hurra, *supra* note 8, ¶49.

III. DMRC'S CASE: DOES IT PASS THE THRESHOLD?

From the above discussion, a few things are clear. Curative petitions have, in the past, only relied on facts to cure a "miscarriage of justice".[29] And, they do not limit themselves to any set form of fact.[30] Accordingly, this current Part will simply check whether there was a "miscarriage of justice", in fact, without entering any discussion on the established law surrounding setting aside arbitral awards. This may render this note academic in nature, but admittedly, such is its purpose.

Even on this academic front, this analysis remains relevant as the DMRC Judgment has received some criticism for deviating from the established grounds of curative jurisprudence and expanding its scope.[31] The authors do not necessarily agree with this stance at this stage. A conclusive answer on the supposed expansion of the scope of the SCI's curative review can only be reached after juxtaposing the facts considered in the DMRC Judgment with those that have been enumerated in Part II of this note. An exercise not undertaken by the above-mentioned critics.[32]

To start, let's consider the points of fact used by the SCI to reach its decision in the DMRC Judgment. It primarily looked at the issue of a certificate issued by the Commissioner of Metro Railway Safety ('CMRS') and whether it should have been entertained as crucial evidence or not.[33] It also referred to the contract between DMRC and DAMPEL, specifically the termination clause and its interpretation by the arbitral tribunal.[34] The SCI based its decision on the discussions surrounding these two points of fact.

Highlighting the latter, the question surrounding the termination clause was whether the tribunal's interpretation of it was a possible view that could be taken or not.[35] If the view taken were not a possible one, according to the SCI, it would render the award perverse.[36] The SCI conclusively held that the interpretation of the termination clause by the tribunal was one which could not be arrived at by a "reasonable person", thus forming a ground to set aside the award.[37]

Notably, a question of interpretation of a contract, or any text for that matter, has never formed the substantive ground of allowing a curative petition.[38] To check whether this expands the scope of a curative review, we have to see whether it can be inferred from any of the other grounds discussed above. As laid down above, the three sets of facts used to allow curative petitions are a lack of appreciation of evidence, a disregard for debilitating external

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[29] *See supra* Part II.C on "Delineating a Framework".
[30] *See supra* Part II.A on "Accepted Petitions".
[31] Vasanth Rajasekaran & Harshvardhan Korada, *Deciphering the Supreme Court's Verdict on DMRC v. DAMEPL — The "Cure" to Longstanding Legal Battle*, SCC TIMES, May 6, 2024, available at https://www.scconline.com/blog/post/2024/05/06/deciphering-supreme-court-verdict-dmrc-damepl-cure-to-longstanding-legal-battle/ (Last visited on October 15, 2024); Durga P. Manda & Urvashi Misra, *DMRC–DAMEPL Arbitration: After-Effects of the Curative Judgement*, SUPREME COURT OBSERVER, June 11, 2024, available at https://www.scobserver.in/journal/dmrc-damepl-arbitration-after-effects-of-the-curative-judgement/ (Last visited on October 15, 2024).
[32] *Id.*
[33] DMRC Judgment, *supra* note 1, ¶¶52–67.
[34] *Id.*, ¶¶48–54.
[35] *See Id.*, ¶47; The "view" of the tribunal was that the termination clause could be triggered by DAMEPL if DMRC failed to 'completely cure' every defect brought up in the cure notice.
[36] *Id.*
[37] *Id.*, ¶¶51, 67.
[38] *See supra* Part II.A on "Accepted Petitions".

circumstances and inordinate delays (in specific circumstances).[39] Even if we consider the widest amplitude of any of these grounds, in our opinion, it will not cover textual interpretation. On this limited point, the DMRC Judgment does seem to have widened the scope of what can be considered during the final, curative review.

Now, let's consider the question of the CMRS certificate. To begin with, the Apex Court notes that the arbitral tribunal set itself up to ignore the CMRS certificate by its unreasonable interpretation of the contract, which led to an incorrect framing of issues.[40] Regardless, it tested the merits of the CMRS certificate, constituting crucial evidence or not.[41] Thus, the Court did not consider an incorrect framing of issues to form an independent ground for allowing this curative petition.

The CMRS certificate was only in discussion to determine whether DMRC has taken "effective steps" to cure a breach of contract after receiving a cure notice from DAMEPL.[42] The Court analysed the content of the CMRS certificate and concluded that it certified the safety of the structure, which indicated "effective steps" being taken by DMRC.[43] The Court considered the joint application of the parties to the CMRS to further the conclusion that "effective steps" were taken by the DMRC.[44]

The Court also reviewed the role of the CMRS as the "relevant statutory stakeholder" under the 2002 Metro Railways (Operation and Maintenance) Act to certify the safety of any metro line.[45] This the Court deemed important due to DAMEPL's focus on the safety of the structure (metro line) in its cure notice.[46] In all, the Court held that the CMRS certificate could not have been ignored by the arbitral tribunal due to its statutory position and relevance in determining whether "effective steps" had been taken.[47] This, according to the Court, rendered the award "patently illegal" and liable to be set aside.[48] It accordingly allowed the curative petition.[49]

This constituted a majority of the reasoning of the Court to set aside the arbitral award. Looking at the standards laid down in this note, it would seem that it resembles the criteria in National Commission for Women.[50] In that case, a lack of appreciation of relevant evidence formed a crucial part of our Apex Court's judgment, allowing the curative petition. The DMRC Judgment then, accordingly, cannot be viewed as increasing the Court's curative powers or scope of review.

Even if we look at the narrative in the DMRC Judgment holistically, it seems to pass the subjective and factual "miscarriage of justice" test for allowing a curative petition. The DMRC Judgment could be viewed as — The Supreme Court of the nation intervened to prevent an arbitral award worth around INR 76,87,00,00,000, which was passed by unreasonably interpreting a contract and ignoring vital evidence, from being enforced against a public sector

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[39] *See supra* Part II.C on "Delineating a Framework".
[40] DMRC Judgment, *supra* note 1, ¶¶52, 55.
[41] *Id.*, ¶¶55–67.
[42] *Id.*, ¶¶49, 58.
[43] *Id.*, ¶¶55, 59, 63.
[44] *Id.*, ¶¶57, 58.
[45] *Id.*, ¶¶61–63; The Metro Railways (Operation and Maintenance) Act, 2002, §§14, 15, 18, 21.
[46] *Id.*, ¶¶60, 64.
[47] *Id.*, ¶67.
[48] *Id.*, ¶68.
[49] *Id.*, ¶69.
[50] *See supra* Part II.A on "Accepted Petitions".

undertaking. The gravity of the facts, which may be inferred as a factor for allowing curative petitions from Navneet Kaur, justifies the Court's decision in the DMRC Judgment.

In all, the authors conclude that though the DMRC Judgment has added a novel element of review at the final stage (contractual interpretation), it does not otherwise expand the curative powers of the Court. In the arbitral context, the Court has warned against using its curative jurisdiction as a matter of course and stated that it cannot open the "floodgates" of litigation.[51]

IV. CONCLUSION

The acceptance of a curative petition is an uncommon occurrence. It is only in very rare situations that the SCI interjects at this stage in the interest of justice. To add to this, an intervention in the decision of the arbitral tribunal, a body premised on an inherently autonomous process, makes the decision extraordinary. Multiple scholars did not shy away from expressing their disappointment with the decision in the DMRC case. However, the authors have presented a slightly differing view. If one were to delve deeper into the jurisprudence surrounding curative petitions, one might notice that the lack of appreciation of evidence has, in the past, formed valid grounds for the acceptance of a curative petition.

The CMRS certificate so issued was indicative of the fact that effective steps had been taken by DMRC to ensure the safety of the structure. The certificate constituted a crucial piece of evidence, rendering the termination of the contract invalid. A lack of appreciation of the contents of the certificate vitiated the entire proceeding. While multiple scholars have condemned this act of intervention, it is in line with the rationale adopted by the SCI in the past, as illustrated in this note. However, admittedly, the SCI's intervention in the tribunal's interpretation of the contract expands the scope of its curative powers to an extent.

While our opinion may not find popular support, the exploration of this perspective is necessary to fully appreciate the strength of the curative powers of the SCI, even in situations which, to some, may seem like an act of judicial encroachment.

[51] DMRC Judgment, *supra* note 1, ¶70.

IN THIS ISSUE

The NUJS Law Review takes great pride in presenting Issue 17(2) of our journal. This issue represents a diverse set of novel scholarship penned by a brilliant set of authors. The issue has only been made possible by the dedicated efforts of our Associate Members. We thank our authors and members for what has been yet another successful publication of the NUJS Law Review.

Dr Ulrich G. Schroeter, in their piece titled "The 1980 Vienna Sales Convention (CISG) as Standard Setter or Obstacle to International Commercial Law Unification", examines the CISG to determine its effects in moulding other international commercial law conventions and instruments. They analyse the 'influence' of the CISG on these other conventions to see whether the Vienna Sales Convention has led to the development of international commercial law. Or has it unexpectedly become an impediment to this development? The paper seeks to answer these questions with a largely empirical analysis of a varying set of international commercial treaties.

Mitali Jain & Nimesh Singh, in their paper titled "Private Enforcement of Competition Law: Revisiting the Legal Framework in India", revisit structural issues with the Indian Competition Act, 2002, to determine why there is a "gross underutilisation" of the private enforcement framework under the Act. They undertake a cross-jurisdictional analysis, too, to contextually highlight these issues with the current Indian framework. The authors recommend a framework which includes recognition of standalone actions and indirect purchaser claims, among other suggestions, to increase the efficiency of privately enforcing antitrust claims in India.

Sunandan Wadadekar and Mridul Anand, in their article titled "Preponderance of Probability and Presumptions of Guilt: Contextualising SEBI's Move Towards More Permissive Evidentiary Standards in Securities Regulation", take a look at the proposed changes in the evidentiary threshold by SEBI when adjudicating claims of fraudulent activities in regulatory actions. They analyse the Supreme Court's decisions mandating a heavy burden of proof on the securities regulator to highlight the difference in the evidentiary threshold sought to be put in place by the draft SEBI (Prohibition of Unexplained Suspicious Trading Activities in the Securities Market) Regulations, 2023. They take a cautionary note against the unintended consequences of these regulations but also acknowledge the possible positive effects of rearming the SEBI with the power to enforce the law and discourage offenders.

Abhiram Nitin, in their paper titled "Special Law, Regular Bail, Perverse Outcome? Assessing Judicial Prejudice in Bail Proceedings under the POCSO Act: Rajballav Prasad, Dharmander Singh, and the Delhi High Court", examine the prejudicial approach adopted by courts in granting bail, thereby undermining the doctrine of presumption of innocence. The authors have specifically focused on cases brought under the Prevention of Children from Sexual Offences Act ('POCSO') owing to its complex stature as a special legislation with regular bail provisions. An emphasis is laid on the stance taken by the Delhi High Court ('DHC') in *Dharmander Singh* v. *State (NCT of Delhi)* ('Dharmander Singh'), which distorts the statutory model for adjudication in bail proceedings. The author explores the trajectory of DHC doctrines in 2022- 2023 to gauge the precedential impact of Dharmander Singh. They end the paper on a positive note, commending the DHC for abstaining from adopting a prejudicial approach in the presence of misleading and pernicious judgements.

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Vadita Agarwal & Tanishq Kabra, in their paper titled "*Self-Incrimination and Digital Evidence- Proposing a Framework Post-Virendra Khanna*", further the discourse surrounding self-incrimination and digital evidence. The discussion is set against the backdrop of the Karnataka High Court's Judgement in *Virendra Khanna* v. *State of Karnataka*, deeming compelled decryption of electronic devices to obtain digital evidence by the accused as not violating their right against self-incrimination. The authors advocate for the adoption of the Foregone Conclusion Doctrine to set in place comprehensive guidelines for the seizure of electronic evidence. They also recommend a harmonisation of the law governing various forms of decryption. *In toto*, the authors encourage striking a balance between investigative practices and the right to privacy by drawing on practices from foreign jurisdictions.

We hope the readers enjoy reading these submissions and welcome any feedback that our readers may have for us. We would also like to thank all the contributors to the issue for their excellent contributions, and hope that they will continue their association with the NUJS Law Review!

Truly,

Board of Editors,

The NUJS Law Review.