Relief) Delhi Airport Metro Express ... vs Additional Director General, ... on 5 December, 2024

Author: Yashwant Varma

Bench: Yashwant Varma, Dharmesh Sharma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 14831/2022 and CM APPL. 45615/2022 (Inter
Relief)

DELHI AIRPORT METRO EXPRESS PVT.
LTD. .....Petiti
Through: Mr. Mahesh Agarwal, Mr. Al
Yadav, Ms. Sayree Basu Mal
and Mr. Harshvardh
Ranawat, Advs.

versus

ADDITIONAL DIRECTOR GENERAL, DIRECTORATE
GENERAL OF GST INTELLIGENCE
& ORS. .....Responden
Through: Mr. Harpeet Singh, SSC for
1.
Mr. R. Ramachandran, Sr. S
for R-2.
Ms. Nidhi Raman, CGSC with
Mr. Akash Mishra, Adv. for
3.
CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

% 05.12.2024

1. The instant writ petition has been preferred seeking the following reliefs:

> "(a) declare that the Impugned Notice dated 11.08.2022 issued by the Respondent No.1 to the Petitioner is:
>
> (i) without jurisdiction, without authority of law, illegal, unsustainable and void ab initio;
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> (ii) ultra vires the provisions of Sections 66B read with 65B(44) of the Finance Act, 1994; and,

(iii) in violation of fundamental rights and protections secured to the Petitioners under Article 14, 265 and 300A of the Constitution of India.

(b) issue a writ of certiorari or a writ or order in the nature of certiorari to call for and examine the records of the proceedings before the Respondent No. 1, and quash and set aside the Impugned Notice dated 11.08.2022 issued by the Respondent No. 1;

(c) issue a writ of mandamus or a writ in the nature of mandamus directing the Respondent No. 1 and 2 to -

(i) withdraw the Impugned Notice dated 11.08.2022, as being issued without jurisdiction, without authority of law, illegal, unsustainable and void ab initio;

and

(ii) not act on or In consequence of the Impugned Notice dated 11.08.2022.

(d) issue a writ of Prohibition or a writ in the nature of prohibition directing Respondent No. 1 & 2 not to initiate or pursue any proceedings in consequence of the Impugned Notice dated 11.08.2022.

(e) Pending the hearing and final disposal of this Petition -

(i) stay the operation of the Impugned dated 11.08.2022 issued by the Res No.1;
(ii) direct the Respondents not to act consequence of the Impugned Notice 11.08.2022; and

(iii) (iii) direct the Respondents not to take any coercive steps on or in consequence of the Impugned Notice dated 11.08.2022.

(f) grant ad interim reliefs in terms of prayer clause (d) above;

and

(g) grant such further and other reliefs or directions as this Hon'ble Court may deem fit and necessary in the facts of the present case."

2. However, and in light of the subsequent developments which have ensued, the petitioner does not propose to pursue a challenge to the validity of Sections 66B and 65B (44) of the Finance Act, 19941.

3. The challenge before us thus stands confined to the validity of the impugned Show Cause Notice2 dated 11 August 2022. From a perusal of the recital which appears therein, it would appear that the respondents had taken the position that the compensation which had 1994 Act This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 12/12/2024 at 21:15:30 come to be awarded by the Arbitral Tribunal in favour of the writ petitioner would be exigible to tax under the 1994 Act. This becomes evident from a reading of the following extracts of the SCN and which are reproduced herein below:

> "2. Intelligence was gathered by officers of the Directorate General of GST Intelligence, (erstwhile Directorate General of Central Excise Intelligence) (in short, 'DGGSTI'), Mumbai Zonal Unit ('MZU') indicating that M/s. DAMEPL, a subsidiary of Reliance Infrastructure Ltd., had been awarded a compensation of Rs.2950 crores by the Arbitral Tribunal against M/s. Delhi Metro Rail Corporation Ltd. (hereinafter referred to as 'DMRC') for alleged breach of the agreement on the Airport Express line and that the compensation covered damages as a result of the alleged breach by DMRC of its obligations under the Concession Agreement and material adverse effect. On the basis of the specific intelligence that M/s. DAMEPL had not discharged their Service Tax liability on the amount of arbitration award, enquiry was initiated on 16.05.2017 (by letter mode) against M/s. DAMEPL by officers of the DGGSTI, MZU under Section 83 of the FA, 1994 read with Section 14 of the Central Excise Act, 1944.
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> 4.6 It can be seen from the submissions of M
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> letters dated 19.12.2019 (Paragraph 3.6 refers) and 01.10.2021 (Paragraph 3.12 refers) that while it has been contended by them earlier that the termination payment was 'liquidated damages', it has been later claimed that the said amount is „not liquidated damages' and whereas on both of these mutually exclusive grounds, it is claimed by M/s. DAMEPL in those replies that no Service Tax was leviable. To understand these terms, we shall expound the commercial meaning thereof:
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> ☐Under the Indian Contract Act, the word 'damages' is understood as compensation under a contract that is paid by the defaulting party to the non-defaulting party. This compensation is awarded to the non-defaulting party to compensate for actionable wrongs of the former. Under a contract, the compensation awarded is categorized as liquidated or unliquidated damages awarded as per the terms governing the contract.

☐Under a contract, the parties may agree to pay a certain sum upon breach of the terms of the contract, which scenario appears to be governed by Section 74 of the lndian Contract SCN This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 12/12/2024 at 21:15:30 Act, 1872, When the agreement between the parties stipulates the sum payable for non-performance, the damages hence paid are known as 'liquidated damages'. Unliquidatcd damages are awarded by the courts or arbitral tribunals after assessing the loss or injury caused to the party suffering from such breach of contract and are apparently governed by Section 73 of the Indian Contract Act, 1872.

Therefore, despite the sub-Article 1.2 (o) of the Concession Contract (refer Paragraph 4.4 hereinabove) providing that the damages payable by either party to the other of them, were mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Party entitled to receive the same and were not by way of penalty or liquidated damages, it appears that in the present case, the sum of damages or the Termination payment was always quantifiable in terms of Article 29.5.2 (Paragraph 4.4 hereinabove refers) and hence, appeared to be in the nature of' liquidated damages' or 'stipulated damages'. The contention raised on behalf of M/s. DAMEPL vide letter dated 01.10.2021 that the Termination payment was not in the nature of 'liquidated damages', therefore, appears unacceptable. Further, the basis of the calculation of the Termination Payment in this specific case, or in general, the calculation of the consideration of a taxable service cannot be used to determine its 'taxability' which aspect is determined looking to the definition of 'service' under Section 65B(44) of the FA, 1994 read with that of 'taxable service' under Section 65B(51) ibid. Therefore, the contention raised by M/s. DAMEPL vide letter dated 01.10.2021 that the amount of Termination Payment was 'a capital receipt' does not appear acceptable. It appears that the ratio of the Advance Rulings, No. GST-ARA-15/2017-18/B-30 dated 08.05.2018 in Re: Maharashtra State Power Generation Company Ltd. of Maharashtra AAR and No. Guj/Gaar/R/2019/06 dated 04.03.2019 of Gujarat AAR in Re: Dholera Industrial City Development Project Ltd. as also the Order No. MAH/AAAR/SS-RJ/09/2018-19 dated 11.09.2018 of the Maharashtra AAAR, though in the context of GST but which are pari-materia, support the levy of ST on liquidated damages.

4.7 The further contention raised by M/s. DAMEPL vide letter dated 19.12.2019 that "the Termination payment received by DAMEPL can, at the most, be construed as a substitute for the Ticket Fares that it could have collected had the Concession Agreement survived". It appears that M/s. DAMEPL have also claimed exemption from levy of Service Tax by linking the 'Termination payment' purportedly to "the services of transportation of passengers, with or without accompanied belongings, by metro rail", which would not have been chargeable to Service Tax under Section 66B of the FA, 1994 w.e.f. 01.07.2012 in the hands of M/s.

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☐As per Section 65B(25) of the FA, 1994, "goods" means every kind of movable property other than actionable claim and money; and includes securities, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

☐As per Section 65B(l) of the FA, 1994, "Actionable claim shall have the meaning assigned to it in section 3 of the Transfer of Property Act, 1882 (4 of 1882).

☐Section 3 of the Transfer of Property Act, 1882, "actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

From the definition of 'service' elaborated at Paragraph 4.1 above, it can be seen that the same excludes, inter-alia, 'an activity' which constitutes merely (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner,· or (ii) a transaction in money or actionable claim. It can be seen that M/s. DAMEPL had clarified in their submissions vide letter dated This is a digitally signed order.

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enquiry cannot be said to be merely a transfer of title. Further, the said activity cannot be said to be an actionable claim on account of an existing debt or beneficial interest. That the transaction is a 'service' has been also impliedly admitted by M/s. DAMEPL, except that they have claimed it to be exempt as being purportedly covered under (i) Section 65(105)(zzzza) of the erstwhile FA, 1994 prior to 01.07.2012, relating to 'the works contract service' on account of which the Termination payment was accrued to M/s. DAMEPL or

(ii) Section 66D(o) of the FA, l994 w.e.f.01.07.2012 insofar as the future revenue from passenger transportation by metro rail was to accrue to M/s. DAMEPL. As discussed hereinabove, the contentions of M/s. DAMEPL as to these exemptions appear wholly unsustainable inasmuch the 'termination payment' entails an entirely different cause of action and an altogether different set of 'service' which is defined under Section 66E(e) of the FA, 1994. It appears from the given set of circumstances that M/s. DAMEPL had agreed to the obligation to tolerate the termination of the contract compelled by the breach in performance or the Material adverse effect caused by DMRC, in return for the compensation of an amount of Rs.2782.33 crores.

4.8 It may not be out of place to discuss the Circular No.178/10/2022-GST, dated 03.08.2022 issued by the CBIC on the subject matter of "GST Applicability on liquidated damages, compensation and penalty arising out of breach of contract or other provisions of law". At the outset, it may be cautioned that the said Circular clarifies the scope of the entry at para 5(e) of Schedule II of the CGST Act, 2017 and does not speak of the applicability of Service Tax on like transactions.

☐Paragraph 2b. of the Circular cites certain two examples but it can be seen that they do not necessarily exhaust the genus or class of such transactions which could be ostensibly covered under the sub-category of "agreeing to the obligation to tolerate an act or a situation".

☐It has been further emphasized at Paragraph 6.1 thereof that one of the parties to such agreement/contract (first party) must be under a contractual obligation to either (a) refrain from an act, or (b) tolerate an act or a situation or (c) do an act and that some consideration must flow in from the other party to the said first party for such (a) refraining, (b) tolerating or (c) doing. It has also been emphasized that there has to be an express or implied agreement; oral or written.

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The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 12/12/2024 at 21:15:30 ☐ Paragraph 7.1.4 of the Circular states that "a reasonable view that can be taken with regard to taxability of liquidated damages is that where the amount paid as liquidated damages is an amount paid only to compensate for injury , loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied" by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages, in such cases liquidated damages are merely a .flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and are not taxable".

It may be seen that M/s. DAMEPL have not disputed the classification of the transaction being covered under 'service' as per Section 65B(44) of the FA, l994 which activity excludes 'the transaction in money' and this latter characteristic of 'a mere flow of money', which appears to be dealt with the Paragraph 7.1.4 of the Circular with respect to leviability of GST would not apply to the instant case in terms of the discussion hereinabove.

It also appears that each operative clause of a contract which is agreed to be executed between a 'promisor' and 'promisee' is an express agreement by itself though may collectively referred to as "the Concession Contract" in the instant case. In the instant case, sub-Article 29.5 dealing with 'Termination for DMRC event of default' appears to be a separate contract unto itself' though the determination of 'the fact of default' and the modality of 'termination payment' may have been made dependent on terms specified elsewhere in that contract. It thus appears that the 'termination payment' does not merely restitute M/s. DAMEPL for the capital investments in the project but also represents consideration for 'toleration of the termination of the contract arising out of the DMRC default' itself and thus, is consideration for the service provided by M/s. DAMEPL to DMRC. The Concession Contract is entered into for execution while the part thereof as relates to 'Termination' is a contract that provides for the refraining, tolerating or doing an act by either M/s. DAMEPL or DMRC. The same would have been the case, in case, if hypothetically, DMRC were to be awarded with a Termination Payment on account of default by M/s. DAMEPL in terms of the Article 29 on 'Termination'.

The said Circular clearly spells that taxability in each case would depend on the facts of that case. It therefore appears that the instant case being distinguishable, the Circular in the context of GST, though pari materia, may not be applicable in the present case to hold that the said activity is not 'a service' at all in terms of Section This is a digitally signed order.

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4.9 From the Concession Agreement and the Arbitral Award in discussion, it appears that the breach of the contract by DMRC on account of their persistent "failure to cure the defects in the DMRC works" or under-performance of DMRC "rendering the operation of the Project highly unsafe with potential to cause loss to human life and property" and the resultant termination of the contract was to be compensated for by DMRC being liable to pay to M/s. DAMEPL, the Termination Payment as per the algorithm devised in sub-Article 29.5.2 of the agreement. As a corollary thereof, M/s. DAMEPL admittedly 'Was in receipt of consideration for agreeing to tolerate the act of DMRC, irrespective of whether such act was within control or otherwise of DMRC, of 'causing the termination of the contract' by their not achieving the agreed-upon standards of performance stipulated in the Concession Contract as a whole. It appears that the assessee s activity of' relinquishment of right as a concessionaire' or in other words, the activity of 'agreeing to tolerate an act' by M/s. DAMEPL for a consideration was squarely covered under the ambit of definition of 'service' under Section 65B(44) of the FA, 1994 read with Section 66E(e) ibid.

The impugned services provided by M/s. DAMEPL, as discussed at Paragraph 4.3 above do not appear to be specified in the negative list under Section 66D of the FA, 1994.

4.10 For determining the point in time when the impugned service shall be deemed to have been provided, we refer to the Point of Taxation Rules, 2011 or "the POT Rules" [introduced vide Notification No. 18/2011-ST, dated 01.03.2011 as amended].

The relevant Rule 3(a) reads thus:

> "RULE 3. Determination of point of taxation. - For the purposes of these rules, unless otherwise provided, point of taxation shall be,-
>
> (a) the time when the invoice for the service provided or agreed to be provided is issued: Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service."

In the instant case, the provision of the service in question by M/s. DAMEPL appears to be completed on the date of the arbitral award i.e.,11.05.2017, which is when the service of 'agreeing to tolerate an act' and the consideration accrued from DMRC to M/s. DAMEPL on that account was recognized.

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4.11 The provisions of Section 142(11)(b) of the CGST Act, 2017, read thus:

> "(b) notwithstanding anything contained in section 13, no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994 (32 of 1994);"

Inasmuch as it appears that the provision of the service of 'agreeing to the obligation to tolerate an act ... ' by M/s, DAMEPL was completed before the coming into force of the GST law w.e.f.01.07.2017; the amounts received on or after 01.07.2017 would not attract the levy of GST in keeping with the provisions of Section 142(11)(6) of the CGST Act, 2017 as the said amounts have been subjected to levy of Service Tax under the FA, 1994.

----To sum up, despite the contentions of the assessee to the contrary, the aforesaid activities of the M/s. DAMEPL thus appear to be a "taxable service" leviable to Service Tax for the period on or after 01.07.2012, in the absence of evidence to the contrary that it falls within the negative list of services under Section 66D ibid or is exempted under any Notification issued under the FA, 1994.

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6.3 It appears from the discussion at Paragra

that the Arbitral Tribunal had granted an Award allowing Termination Payment of Rs.2782.33 crores (Rs. 27,82,33,23,220), the claim to reimbursement of net costs of operating the line from 07.01.2013 up to 30.06.20 l 3 of Rs.147.52 crores, the refund of bank guarantee of Rs.55 crores, the claim of differential commission charged by the bank of Rs.7.07 crores as also the reimbursement of security deposit of Rs.56.8 lakhs, along with interest, by DMRC to M/s. DAMEPL. The instant notice concerns itself with the declared service viz., "agreeing to the obligation to tolerate an act.." as defined under Section 66E(e) of the FA, 1994, which was provided by M/s. DAMEPL to DMRC in lieu of a consideration in the form of 'the termination payment'. Therefore, in terms of the provisions of Section 67 of the FA, 1994 relating to valuation of taxable services read with the ST Valuation Rules, the reimbursement of security deposit and the reimbursement of net costs of operating the metro line are, both, not connected to the taxable services in question and hence, not within the scope of this Notice. The refund of bank guarantee and the differential commission demanded by the bank are, both, not connected to the impugned service dealt with by this Notice and hence, are out of the scope of this Notice. It is also noticed that the award includes interest on each of the said amounts. In view of Rule 6(2) of the ST Valuation Rules, the interest on delayed payment of the consideration in respect of the impugned This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 12/12/2024 at 21:15:31 service in question or for that matter, in respect of any of the services, would not be includible in the value of the taxable service.

6.4 The assessee appear not to have submitted any reply/documents called for regarding the copies of all the basic underlying documents i.e., vouchers, debit notes, invoices raised on DMRC for dues, under the Arbitral Award. Hence in the absence of data to the contrary, the "Gross amount receivable from DMRC as Termination Payment" has been taken as "the gross amount charged"

for the taxable service in question."

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12. Now, therefore, M/s. Delhi Airport Metro Express P. Ltd., SPV of Reliance Infrastructure Limited, situated at Reliance Centre, Ground Floor, 19 Walchand Hirachand Marg, Ballard Estate, Mumbai, Maharashtra-400001, are hereby required to show cause, within 30 days of receipt of this notice, to the Principal Commissioner, Central Tax & Cx,, Delhi West COST & CX Commissionerate, having office at 4th & 5th Floor, ElL Annexe Building, Plot 2B, Bhikaji Cama Place, New Delhi-110066, as to why:

(i) The services provided by them, as discussed at Paragraph 4 above, should not be classified as declared service under the category of "agreeing to the obligation to tolerate an act" as defined under Section 66E(e) of the FA, 1994 read with Section 65B(44) and Section 65B(51) of the FA, 1994 as amended w.e.f. 01,07,2012;

(ii) Service Tax amounting to Rs. 4,17,34,98,483/- [Basic ST:

Rs. 3,89,52,65,251/-, SBC: Rs. 13,91,16,616/-, KKC: Rs. 13,91,16,616/-] (Rupees Four hundred Seventeen crores Thirty Four Lakhs Ninety Eight thousand Four hundred Eighty Three Only) (as per Paragraph 7 above) under 'the declared service' viz. 'agreeing to tolerate an act', should not be demanded and recovered from them under the proviso to sub-section (1) of Section 73 of the FA, 1994 read with Sections 66B and 68 of the FA, 1994;

(iii) Interest on the said ST demanded and payable as mentioned at (ii) herein-above should not be recovered from them, under Section 75 of the FA, 1994;

(iv) Penalty should not be imposed upon them under the provisions of the Section 77 of the FA, 1994 for: failure to pay ST within the prescribed due dates as required under Section 68 of the FA, 1994 read with Rule 6 of the STR, 1994, failure to furnish prescribed returns giving the correct and accurate information of 'the value of taxable services This is a digitally signed order.

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(v) Penalty should not be imposed on them under Section 78 of the FA, 1994, for suppressing & concealing the taxable value of the said services with a blatant & preconceived intent to evade payment of the resultant ST due from them.

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16. This Notice is restricted to the issue of non-payment of Service Tax on the impugned 'declared services classifiable under Section 66E(e) of the FA, 1994 provided by M/s. DAMEPL to DMRC during the period mentioned in the Show Cause Notice. This Notice is issued without prejudice to any other action that may be taken against M/s. DAMEPL or any other person(s), whether mentioned herein above or not, under the provisions of the Finance Act, 1994, and the Rules made thereunder, and/or, under any other law for the time being in force in India."

4. The challenge which now survives, however, would fall within a narrow compass as would be manifest from the recordal of the following facts.

5. The arbitral proceedings culminated in an Award dated 11 May 2017 which came to be rendered in favour of the writ petitioner and against the Delhi Metro Rail Corporation3. The validity of that Award came to be assailed in a petition under Section 34 of the Arbitration and Conciliation Act, 19964 and which came to be dismissed by a learned Single Judge of this Court on 06 March 2018.

However, the appeal under Section 37, which came to be preferred by DMRC, thereafter came to be partly allowed by a Division Bench of this Court in DMRC vs. Delhi Airport Metro Express Pvt. Ltd.5

6. A Special Leave Petition against that judgment came to be preferred before the Supreme Court wherein two learned Judges of the DMRC Act 2019 SCC OnLine Del 6562 This is a digitally signed order.

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7. The aforesaid decision of the Supreme Court has ultimately come to be set aside in terms of the judgment rendered on 10 April 2024 on a curative petition in DMRC vs. Delhi Airport Metro Express Pvt. Ltd.7 We deem it appropriate to extract the following paragraphs from the decision rendered in that set of curative petitions:

> "42. 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. [Chandi Prasad Chokhani v. State of Bihar, 1961 SCC OnLine SC 165 : AIR 1961 SC 1708; Pritam Singh v. State, 1950 SCC 189.] 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 judgment 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.
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> 44. This Court in appeal against the judgment [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562 (Division Bench)] 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. [Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131, paras 37-38 : (2022) 1 SCC (Civ) 330] On 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

(2022) 1 SCC 131 (2024) 6 SCC 357 This is a digitally signed order.

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45. 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 [Associate Builders v. DDA, (2015) 3 SCC 49 :

> (2015) 2 SCC (Civ) 204] and Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] . 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 CMRS certificate to be irrelevant to the validity of the termination.
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> 66. 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 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 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 [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562 (Division Bench)] 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 [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] and Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] .

H. Conclusion

67. The judgment of the two-Judge Bench [Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131 : (2022) 1 SCC (Civ) 330] of this Court, which interfered with the judgment [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562 (Division Bench)] of the Division Bench of the High Court, has resulted in a miscarriage of justice. The Division Bench This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 12/12/2024 at 21:15:31 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 judgment [DMRC v. Delhi Airport Metro Express (P) Ltd., 2019 SCC OnLine Del 6562 (Division Bench)] 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 [Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388] .

68. 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 judgment 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.

69. 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.

70. 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 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 12/12/2024 at 21:15:31 where the process of arbitration has been perverted by the Arbitral Tribunal to provide an undeserved windfall to Damepl.

71. The curative petitions are allowed in the above terms. Pending applications, if any, stand disposed of."

8. It is thus manifest that the Award rendered by the Arbitral Tribunal has itself ultimately come to be set aside. In view of the aforesaid, the very foundation of the SCN and which had proceeded on the basis of the compensation which had come to be awarded to the writ petitioner under that Award, no longer survives.

9. In view of the aforesaid, we allow the instant writ petition and quash the SCN dated 11 August 2022.

YASHWANT VARMA, J DHARMESH SHARMA, J DECEMBER 5, 2024/gunn This is a digitally signed order.

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