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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment pronounced on:22.07.2024

\+ **O.M.P. (COMM) 310/2022, IA Nos.11536/2022 & 1013/2023**

TRANS ENGINEERS INDIA PRIVATE LIMITED ..... Petitioner

Through: Mr. Arvind Nigam, Sr. Advocate along with Ms. Binsy Susan, Ms. Neha Sharma, Ms. Palak Kaushal, Ms. Ayushi Thakur, Mr. Amogh Srivastava, Mr. Vishal Habloni and Mr. Arijeet Shukla, Advocates.

versus

OTSUKA CHEMICALS (INDIA) PRIVATE LIMITED.. Respondent

Through: Mr. Jayant Mehta, Sr. Advocate along with Mr. Amit Dhingra, Mr. Rohit Mahajan, Ms. Anu Shrivastava, Mr. Akshat Aggarwal, Ms. Kesang T. Doma and Mr. Udit Dediya, Advocates.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. By way of the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "**A&C Act**"), the petitioner seeks to assail the arbitral award dated 07.03.2022 (hereinafter referred to as the "**impugned award**")passed by the learned sole arbitrator.

2. The respondent is stated to have engaged the petitioner/claimant for expansion of its plant at the project site located at RIICO Industrial Area,

Keshwana Rajpoot, Tehsil- Kotputli, District Jaipur, Rajasthan. The said project was called "Lion project" by the respondent. For the purpose of executing the aforesaid project, two purchase orders dated 16.09.2016 (hereinafter referred to as the "**POs dated 16.09.2016**") for a total sum of Rs. 71 crores were issued by the respondent to the claimant. An agreement dated 20.01.2017 (hereinafter referred to as the "**agreement dated 20.01.2017**") was also executed between the parties, in terms of which, the petitioner was supposed to supply, erect, manufacture and commission equipment, piping systems, instrumentation material and electrical material for the aforesaid Lion Project.

3. Disputes arose between the parties with respect to the petitioner's claim for price of additional works which are stated to have been performed by the petitioner at the instance of the respondent. The petitioner raised 26 proforma invoices in relation to the additional works, which the respondent refused to pay, leading to a dispute between the parties, which was referred to arbitration.

4. It was the petitioner's case before the learned sole arbitrator that the instructions with respect to the additional works were given by the respondent in writing, in the form of modifications, changes and/or revisions to the Piping and Instrumentation Drawings (hereinafter referred to as the "**P&IDs**"), equipment lists and other documentary and oral instructions. According to the petitioner, the said aforesaid additional works led to a huge expansion in the original scope of the work agreed to between the parties.

5. The petitioner/claimant in its statement of claims prayed for the following:

a. A sum of Rs.28,37,09,384/- payable by the respondent to the claimant in view of additional works carried out by the claimant at the instance of the respondent during the currency of the project;

b. A sum of Rs. 5,76,30,239/- payable by the respondent to the claimant towards statutory dues and taxes on the total claim amount of Rs. 28,37,09,384/-;

c. A sum of Rs. 1,50,00,000/- payable by the respondent to the claimant as cost of arbitration proceedings; and

d. *Pendente lite* and future interest payable by the respondent to the claimant.

6. The respondent in its statement of defence prayed for the following counter-claims against the claimant:

i. A sum of Rs. 3,55,00,000/- as liquidated damages for delayed completion of the work;

ii. A sum of Rs. 43,81,278/- for pending and remedial work undertaken by the respondent towards the Lion Project;

iii. A sum of Rs. 21,67,000/- towards costs for the price difference between Shell and Tube HE and PHE;

The respondent also sought simple interest at 18% per annum on the amounts found payable under its counter-claims, from the dates the aforesaid amounts became due, till the date of payment. The respondent also sought costs of the arbitral proceedings.

7. The claimant (petitioner) based its Claim for additional works on the premise that the original scope of work agreed between the parties was based on the P&IDs of 26.07.2016, and the petitioner was entitled to charge

extra amount for any major modifications incorporated in P&IDs after 26.07.2016. This was, however, refuted by the respondent. It was contended by the respondent, in its statement of defence, that any change in scope, must be measured from the date of agreement i.e. 20.01.2017. In its written submissions filed before the Arbitrator, the respondent contended that the original scope of work is contained in the P&IDs dated 20.08.2016 (which are prepared after the aforesaid P&IDs of 26.07.2016, and were submitted alongwith the offer dated 30.08.2016). This was one of the central points for determination in the Arbitration.

THE AWARD

8. In the impugned award, the learned sole arbitrator, after noting the factual background and the rival contentions of the parties, adjudicated upon the claims and counter-claims of parties in the following manner:

9. With respect to Claim 'A' of the petitioner/claimant, seeking a sum of Rs.28,37,09,384/- in respect of the additional works carried out by the claimant at the instance of the respondent during the currency of the project, the impugned award *inter alia* held as under:

i. The parties had not given a 'go-by' to the offer dated 30.08.2016 of the petitioner and the P&IDs dated 20.08.2016;

ii. The POs dated 16.09.2016 defined the scope of work based on the offer dated 30.08.2016 and the P&IDs of 26.07.2016 and as such it cannot be said that the offer dated 30.08.2016 and the P&IDs dated 20.08.2016 were not a part of the contract between the parties;

iii. The respondent has proved on record a chart Exh.R.W-1/186 which shows that the equipment shown by the petitioner as "extra" was either reflected in the P&IDs of 26.07.2016 or the offer dated

30.08.2016, which itself was based on the P&IDs dated 20.08.2016;

iv. The testimony of RW-1 proves on record that almost 90% of the equipments claimed as "extra" by the claimant were reflected in the P&IDs of 26.07.2016 or the offer dated 30.08.2016 and the P&IDs dated 20.08.2016. In the cross examination of CW-1, he admitted that various items shown as "extra" by the claimant in the Proforma Invoice 9 were there in the P&IDs dated 26.07.2016 also;

v. The P&IDs dated 26.07.2016 were only basic P&IDs which were open to revisions from time to time and the offer dated 30.08.2016 and the P&IDs of 20.08.2016 were also a part of the contract between the parties;

vi. The POs issued by the respondent were based on the P&IDs dated 26.07.2016 and offer dated 30.08.2016 which was based on the updated P&IDs dated 20.08.2016;

vii. The work had started on 16.09.2016 prior to the execution of the agreement dated 20.01.2017 and that the said agreement contained the full details of the work to be executed by the claimant and was for a fixed price of Rs.71 crores. Had any additional work been included in the said agreement dated 20.01.2017 or had revision in P&IDs had resulted in "major additional work", the petitioner would have insisted for revision of the price in the said agreement.

10. In view of the abovementioned reasons, the arbitral tribunal held that the claimant was not able to establish that it was entitled to recover the amount of proforma invoices as claimed under Claim 'A'.

11. Accordingly, the Claim 'B' of the claimant for a sum of Rs.5,76,30,239/- for recovery of the applicable statutory dues and taxes claimed under Claim 'A' was also rejected.

12. The counter-claim raised by the respondent was also rejected in the impugned award.

13. With respect to Counter Claim No.1 of the respondent for a sum of Rs.3.55 Crores, the arbitral tribunal held that the respondent failed to prove on record that it was entitled to recover liquidated damages from the claimant and therefore rejected the said counter claim of the respondent.

14. With respect to Counter Claim No.2 of the respondent claiming a sum of Rs.43,81,278/- for pending and remedial work undertaken by the respondent towards the Lion Project, the arbitral tribunal held that the claimant had not served any notice to the claimant in terms of Clause 12.4 of the contract, asking it to rectify the defective work. The arbitral tribunal held that there was no evidence on record regarding the amount allegedly spent by the respondent for rectification or the competition of work through other agencies and therefore rejected the aforesaid counter claim of the respondent.

15. With respect to Counter Claim No.3 of the respondent seeking a sum of Rs.21,67,000/- towards costs for the price difference between Shell and Tube HE and PHE, the arbitral tribunal held that if any amount had been due to the respondent under Clause 5 / Schedule 5 of the Agreement, the respondent would have deducted the same from the payment that was made by the respondent to the claimant. It was held by the arbitral tribunal that non-deduction by the respondent clearly indicated that no amount in this

regard was recoverable by the respondent from the claimant, and therefore rejected the aforesaid counter claim of the respondent.

16. After taking note of the fact that the claims and counter claims of the parties stood rejected, the arbitral tribunal left the parties to bear their own costs and a “Nil” award was passed by the arbitral tribunal.

SUBMISSIONS ON BEHALF OF THE PETITIONER

17. It is submitted on behalf of the petitioner that initially, the respondent had issued a letter of intent dated 21.04.2016 to the petitioner for providing consultancy services for (i) civil and structural design and, engineering; (ii) detailed engineering – piping and instrumentation diagram (P&ID), vessel GA, equipment layout, isometrics, mechanical, electrical and instrumentation consultancy services along with civil consultancy services (hereinafter referred to as the “consultancy job"). In terms of the letter of intent dated 21.04.2016, a purchase order dated 27.05.2016 was issued by the respondent to the petitioner for an amount of INR 3,00,00,000 for the consultancy job. The petitioner duly complied with the scope of the work and successfully completed the consultancy job. The petitioner raised invoices for this work and the same were cleared by the respondent on 16.06.2017.

18. Under the said consultancy job, the petitioner was required to prepare layout of designs and P&IDs, based on the instructions and specifications issued by the respondent namely, Process Flow Diagrams (hereinafter referred to as "**PFDs**").

19. It is submitted on behalf of the petitioner that PFDs are block quantitative representation of facilities, which shows the relationship between major components and equipment and design values and that

P&IDs are much more detailed and elaborate than PFDs. P&IDs are stated to be a schematic illustration of functional relationship between piping, instrumentation, and system equipment components with all details like capacities of the equipment and material of construction, etc. including valves and instruments.

20. It is submitted that the respondent was required to provide the petitioner, with equipment list(s) which were to specify the material of construction, capacities of equipment, temperature, pressure parameters of the process material and all the technical knowhow, which were only known to the respondent (based on the requirement of the Project). However, the respondent did not provide complete specification of the equipment, i.e., the material of construction and capacities. In the PFDs supplied by the respondent to the petitioner, the respondent is stated to have not completely specified the material of construction, complete size, and specifications of all the equipment, and other parameters, etc., due to which, at the time of making the offer dated 30.08.2016, the petitioner was not aware of the complete technical specifications of several equipment and was unable to account for all such unspecified equipment in the offer dated 30.08.2016.

21. The petitioner's offer dated 30.08.2016 is stated to have never been accepted by the respondent as the respondent was not willing to accept the lump-sum fee of Rs. 89,79,97,250/- quoted by the petitioner. It is submitted that the parties had agreed that the petitioner would be paid for the additional works performed by it separately.

22. A meeting dated 15.09.2016 is stated to have been held, whereby the parties discussed the terms of the contractual arrangement for manufacturing, supply, fabrication and erection of equipment, piping

system, instrumentation and electrical material. Pursuant to the aforesaid meeting, the parties are stated to have signed Minutes of Meeting (hereinafter referred to as "MoM"), which clearly defined the original scope of the work to be based on P&IDs of 26.07.2016. The learned counsel for the petitioner has drawn attention to the following portion of the aforesaid MoM dated 15.09.2016:

> *"The turnkey job has been awarded to Trans Engineers India Pvt. Ltd. in lumpsum for 710 Million INR based on P&IDs finalized by 26th July 2016, for ongoing Lion Project as per the scope of work defined based on which offer was submitted by Trans Engineers. No extra amount will be charged by Trans for smaller modifications. However, for any major modifications incorporated in P&IDs after 26th July 2016, Trans will charge extra amount on mutually agreed rates. "*

23. Based on the aforesaid MoM, it is submitted that the parties had agreed that the original scope of the work of the petitioner was based on P&IDs finalised by 26.07.2016, for a lumpsum amount of Rs.71 crores. It is averred that the MoM clearly records the understanding of the parties that for any major works arising from modifications incorporated in the P&IDs after 26.07.2016, the petitioner would be entitled to charge extra amounts on mutually agreed rates.

24. It is submitted that a Letter of Intent dated 15.09.2016 was also issued by the respondent in favour of the claimant for the manufacture, supply, fabrication and erection of equipments, piping system, instrumentation and electrical material, etc. for a total price of Rs.71,00,00,000.

25. It is further submitted that subsequently, two POs dated 16.09.2016 were issued by the respondent in favour of the petitioner.

26. The PO No. LPJ-54/16-17 for a sum of INR 59,98,07,240/-was for supply of equipment, piping system, instrumentation material and electrical

material to the Respondent, and the PO No. LPJ-WO-12/16-17 for a sum of Rs.11,01,92,760 was for carrying out erection and commissioning of equipment, piping system, instrumentation material and electrical material.

27. It is submitted that even in the terms and conditions appended to the POs dated 16.09.2016, the scope of supply/installation was defined to be as per P&IDs dated 26.07.2016.

28. It is submitted that the petitioner commenced work on the basis of the scope of work provided under the P&IDs of 26.07.2016, as confirmed by the MoM and LOI dated 15.09.2016 and also the POs dated 16.09.2016.

29. It is submitted that the agreement dated 20.01.2017 was executed between the parties to give a formal effect to the contractual arrangement agreed between the parties over months and was executed when the project was already at an advanced stage.

30. During the execution of the project, the P&IDs were revised on multiple occasions, on the instructions/insistence of the respondent. These multiple revisions in the P&IDs are stated to have caused a huge modification in the original scope of work. It is averred that the P&IDs were finalised by the respondent as late as 07.07.2017, which was very close to the project completion date, i.e., on 31.07.2017. It is submitted by the learned counsel for the petitioner that between the P&IDs dated 26.07.2016 and 07.07.2017, there were a total of 32 ‘major’ revisions carried out by the petitioner at the instructions of the respondent.

31. As per claimant/petitioner, the agreement dated 20.01.2017 provides that the claimant would prepare the P&IDs for the project but the respondent could issue further drawings, sketches and issue written instructions to the claimant with regard to the work from time to time. It is submitted that the

claimants were under an obligation to comply with the written instructions of the respondent. It was also agreed that for any major change in the work or variations or modifications beyond the scope of the work, the respondent would be liable to pay the claimant the extra amounts at a mutually agreed price. The claimant is also stated to have been entitled to extension of time for the work beyond the scope of the work originally agreed upon.

32. The petitioner/claimant has averred that its claim for additional works performed by it at the instance of the respondent in pursuance with the contractual arrangement between the parties has wrongly not been granted by the arbitral tribunal in the impugned award.

33. It is submitted that the instructions in relation to these additional works were given by the respondent in writing in the form of modifications, changes and/ or revisions to the P&IDs, equipment lists and other documentary and oral instructions. It is stated that such additional works led to a huge expansion in the original scope of work agreed between the parties.

34. It is submitted by the petitioner that the arbitral tribunal has rejected all of the petitioner's claims without considering the submissions made by the petitioner, while ignoring clear evidence on record, while proceeding on an implausible interpretation/reading of the contractual understanding between the parties. It is also submitted that the arbitral tribunal has overlooked the documents placed on record.

35. The learned senior counsel for the petitioner has submitted that the impugned award suffers from patent illegality as the arbitral tribunal has overridden the contractual understanding between the parties by rewriting the terms of the agreement between the parties.

36. It is also submitted that the impugned award is in contravention of the fundamental policy of Indian law which covers compliance with statutes and judicial precedents being relied upon by the parties.

37. It is submitted that the grounds for challenging the impugned award have been specifically provided under Section 34(2)(b)(ii) and Section 34(2A) of the A&C Act.

38. The petitioners/claimants seek to challenge the impugned award on the following grounds:

A. The Tribunal has overlooked the contractual agreement between the parties and has re-written the terms of the contract between the parties

39. The learned senior counsel for the petitioner contends that the arbitral tribunal has overlooked the contractual agreement between the parties and has re-written the terms of the contract.

40. It is averred that the Arbitral Tribunal's findings in paras 56-58 of the impugned award, that the offer dated 30.08.2016 based on the P&IDs dated 20.08.2016 formed the foundation of the agreement dated 20.01.2017 between the parties is patently illegal. In this regard, it is submitted that a) the tribunal's decision is based on P&IDs dated 20.08.2016 which were not filed by the parties before the arbitral tribunal and were therefore never examined by the arbitral tribunal; b) the tribunal has overlooked the MoM dated 15.09.2016 which forms the fundamental basis of the contractual relationship between the parties, and where the parties had agreed that the petitioner would perform the contract based on the P&IDs dated 26.07.2016 and not as per the P&ID dated 20.08.2016; and c) the lumpsum fee payable for the agreed scope of work was Rs. 71,00,00,000/- based on the P&IDs

dated 26.07.2016 and not Rs. 89,79,97,250/- that was quoted in the offer dated 30.08.2016 , which shows that the said offer never culminated into a contract between the parties.

41. It is submitted that the tribunal has failed to consider that in terms of the MoM, the petitioner's original scope of work was based on P&ID dated 26.07.2016 and all the subsequent major modifications qualified as additional works, for which the petitioner was entitled to receive additional payments from the respondent on mutually agreed rates. It is further submitted that the tribunal has disregarded the MoM and not given any findings as regards to its effect in the impugned award. It is further submitted that it is on the basis of the contractual understanding between the parties recorded in the MoM that the respondent had issued its LoI dated 15.09.2016 and POs dated 16.09.2016. It is further submitted that the petitioner had also commenced with the work based on the POs dated 16.09.2016 much before the Agreement dated 20.01.2017 was executed. It is averred that the respondent had already made a payment of INR22,00,00,000 to the petitioner, before the execution of the Agreement dated 20.01.2017.

42. It is submitted by the learned senior counsel for the petitioner that the arbitral tribunal has failed to consider the express terms of the agreement dated 20.01.2017 between the parties and has taken an implausible view of the contractual understanding between the parties. It is further submitted that in terms of Clause 15.3 and Schedule 5 of the Agreement dated 20.01.2017, the petitioner was entitled to additional payments for all variations, modifications, changes and increase in the Bill of Quantities / scope of work.

43. The finding of the Arbitral Tribunal at Para 63 of the impugned award, whereby the impugned award finds that "*a comparison of GFC Drawings and "as built" Drawings could have easily shown the nature of additional or "extra" work executed by the Claimant*" is stated to be perverse, patently illegal and contrary to the contractual understanding between the parties regarding the scope of the work and is also sought to be challenged by the petitioner on the ground that the same amounts to re-writing the contract between the parties because:

i. In terms of the MoM and POs, the original scope of work agreed between the parties was based on the P&IDs dated 26.07.2016, and the petitioner was entitled to charge extra amount for any major modifications incorporated in the P&IDs after 26.07.2016;

ii. There was no contractual obligation on the petitioner under the MoM, the POs or the Agreement dated 20.01.2017, to compare the GFC drawings as the 'as-built' drawings to prove the additional scope of the work;

iii. The respondent's reliance upon the consultancy job PO before the arbitral tribunal in support of its argument that the original scope of work was based on GFC drawings was misplaced inasmuch as the parties had executed two independent and separate contracts with respect to the consultancy job and the project in question (Lion Project). It is submitted that the scope of the agreement under which the arbitration proceedings were initiated was limited to the two POs dated 16.09.2016 only. The Agreement dated 20.01.2017 did not cover the services provided by the petitioner under the consultancy PO and the same is evident from the

contract price set out in Schedule 5 of the Agreement dated 20.01.2017 which corresponds to the aforesaid POs dated 16.09.2016.

44. It is submitted on behalf of the petitioner that the findings in paragraphs 56-58 of the impugned award that the P&IDs dated 20.08.2016 formed the original scope of work are baseless and devoid of any merit since neither the MoM nor the POs refer to the P&IDs dated 20.08.2016. Further, it is submitted that it is evident from a perusal of the MoM and the POs, that the petitioner had agreed to perform the contract for a lumpsum amount of Rs. 71,00,00,000/- based on the P&IDs of 26.07.2016 and not for Rs. 89,79,97,250/- quoted in the offer dated 30.08.2016, which was based on the P&IDs dated 20.08.2016. Moreover, in the MoM dated 15.09.2016 and the POs dated 16.09.2016, the parties are stated to have expressly referred to the P&IDs dated 26.07.2016, deliberately disregarding the updated version of the P&IDs dated 20.08.2016 on which the offer dated 30.08.2016 was based. It is contended that the P&IDs dated 20.08.2016 were not placed on record and were not examined by the arbitral tribunal.

45. It is further submitted that the Arbitral Tribunal failed to consider the express terms of the Agreement dated 20.01.2017 contained in Clauses 12.2, 15.3 and Schedule 5 of the aforesaid Agreement. In terms thereof, the petitioner was entitled to additional payments for all variations, modifications, changes and increase in the Bill of Quantities/scope of work.

B. The tribunal has ignored vital documentary and oral evidence on record in relation to the additional works performed by the petitioner and proof of the extra costs incurred by the petitioner (Section 34 (2A) of the A&C Act)

46. It is submitted on behalf of the petitioner that the arbitral tribunal's finding in paragraphs 58 and 60 of the impugned award that the proforma invoices raised by the petitioner included equipment which were already a part of P&IDs dated 26.07.2016 or the offer dated 30.08.2016 is stated to be in complete ignorance of the evidence on record.

47. The tribunal's findings in paragraph 73 of the impugned award that the completion certificate dated 25.07.2017 was a 'fictitious document' is stated to be baseless and contrary to the evidence on record. It is submitted that the arbitral tribunal has ignored the fact that the completion certificate was presented by the respondent to the petitioner in the inaugural ceremony of the project in recognition of completion of works. It is averred that the aforesaid finding by the tribunal is unsupported by any evidence or cross-examination during the trial. In this regard, the learned counsel for the plaintiff has sought to rely upon the Judgments in ***State of Chhattisgarh v. SAL Udyog (P) Ltd.***[1]*and* ***Patel Engineering Limited v. North Eastern Electric Power Corporation Limited***[2].

C. The Tribunal has passed an unreasoned award

48. It is contended by the learned senior counsel for the petitioner that the arbitral tribunal has failed to provide any intelligible reasons to support its decision in respect of vital aspects of the award. It is submitted that in paragraph 56 of the impugned award, the tribunal has merely stated facts and referred to the corresponding documents and arguments advanced by the parties to conclude that the offer dated 30.08.2016 based on P&IDs dated

[1](2022) 2 SCC 275, Para 23
[2] 2020 SCC OnLine SC 466, Para 24, 26, 27

20.08.2016 was never rejected by the respondent and that the same formed the foundation of the Agreement between the parties. It is submitted that in the absence of cogent reasoning, the findings of the tribunal in this regard are perverse and liable to be set aside.

49. It is submitted that the award is vitiated due to the failure of the arbitral tribunal to take into consideration the evidence placed on record by the petitioner. In support of this argument, the learned counsel for the petitioners has relied upon the Judgments of the Supreme Court in ***M/s Dyna Technologies Pvt. Ltd. v. M/s Crampton Greaves Ltd.***[3]***;*** and***GVK Jaipur Expressway Private Ltd. v. National Highway Authority of India***[4].

SUBMISSIONS ON BEHALF OF THE RESPONDENT

50. The submissions on behalf of the petitioner have been controverted by the learned senior counsel for the respondent, who submits that the impugned award does not warrant any interference under Section 34 of the A&C Act as per the law laid down by the Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI,*** (2019) 15 SCC 131.

51. The learned senior counsel for the respondent submits that the impugned award is a well-reasoned award and has been passed after duly taking into consideration the evidence and documents on record. It is submitted that the view taken by the arbitral tribunal is a possible and plausible view and the same should not be interfered with by this court.

[3]2019 SCC Online 1656, Para 35, 39 - 42
[4]2021 SCC OnLine Del 4851, Para 51, 52, 54, 55

52. Relying upon the Judgments in ***UHL Power Co. Ltd. v. State of H.P.***[5]***; ONGC Ltd. v. Discovery Enterprises (P) Ltd.***[6], and a recent Judgment passed by a Division Bench of this Court in ***Raghunath Builders Pvt Ltd vs Anant Raj Limited***[7], it is submitted by the learned senior counsel for the respondent that the interpretation of the clauses of a contract is in the exclusive domain of the arbitral tribunal and the impugned award does not warrant any interference of this court.

53. It is submitted that i) the works carried out by the petitioner and claimed as extra-works were within its original scope of work being part of the lumpsum turnkey contract between the parties; ii) the petitioner has failed to establish the quantum of original works to derive the alleged extra-works and that there were no measurements taken for the alleged extra work nor were the unilateral measurements filed by petitioner/claimant exhibited or proved, and (iii) even otherwise, the petitioner also failed to provide any documentary proof to prove the alleged costs incurred by it in procuring and installing the alleged extra work.

54. It is submitted that it was also the respondent's case before the arbitral tribunal that the agreement dated 20.01.2017 defined the scope of work between the parties and the Good for Construction (hereinafter referred to as the "**GFC**") drawings had been prepared by the petitioner itself prior to the execution of the agreement dated 20.01.2017 and therefore, it had full knowledge of the extent of work to be carried out in the project based on these drawings. It is further submitted that if the two POs dated 16.09.2016 were taken to be the definitive agreements between the parties, the same

[5] (2022) 4 SCC 116, Para 18-22
[6] (2022) 8 SCC 42, Para 53
[7] 2023 SCC Online Del 7202, Para 40

were based on the offer dated 30.08.2016 which refers to the P&IDs dated 20.08.2016. Therefore, the original scope of work is stated to be contained in the P&IDs dated 20.08.2016, which were the updated P&IDs which were prepared after the P&IDs dated 26.07.2016. It is further submitted that the P&IDs dated 20.08.2016, were not even filed by the petitioner in the arbitral proceedings.

55. The learned senior counsel for the respondent submits that the construction and interpretation of the terms of a contract is for an arbitrator to decide.

56. It is strenuously contended by the learned senior counsel appearing on behalf of the respondent that the offer dated 30.08.2016 was on a lumpsum turnkey basis and the same was based on P&IDs dated 20.08.2016.

57. Relying upon the MoM dated 15.09.2016, it is submitted that the said MoM states that the same was for a turnkey job based on P&IDs finalised by 26.07.2016 “as per the scope of work defined based on which offer was submitted.”. It is submitted that the said “offer” referred to in the MoM is the offer dated 30.08.2016 and the same stands proved by CW-I’s answer to Q.21 r/2 Q.38 and Q.39.

58. It is submitted that the LoI issued by the respondent only refers to the petitioner’s offer and was issued only to initiate necessary action to start the works. It is further submitted that necessarily, as the LoI does not refer to the P&IDs of 26.07.2016, the starting of work can only be based on the offer dated 30.08.2016 which was based on the P&IDs dated 20.08.2016.

59. The PO issued by the respondent for manufacture and supply of equipment, piping material, instrumentation and electrical material and the PO issued by the respondent for erection and commissioning are stated to be

for Rs.71 crores exclusive of taxes. It is submitted that the said POs record as under:

> "*the supply/erection and commissioning of equipment piping instrumentation material, electrical material of our LPJ Project as per your offer dated 30.08.2016 and as per P&IDs dated 26.07.2016*"

It is submitted that therefore, the POs required the petitioner to execute the project based on P&IDs dated 26.07.2016 and the P&IDs dated 20.08.2016 which were incorporated in the offer dated 30.08.2016. It is further submitted that in answer to Q.78 r/w R.68, CW-I has admitted that the PO was based on P&IDs dated 26.07.2016 and the offer dated 30.08.2016, which is based on the updated P&IDs of 20.08.2016.

60. It is contended that nothing has been overlooked by the arbitral tribunal as claimed by the petitioner. On the contrary, the arbitral tribunal is stated to have duly considered the P&IDs dated 26.07.2016, the MoM, the LoI and the offer dated 30.08.2016 while passing the impugned award.

61. Reliance is placed upon ***Nabha Power v. PSPCL***[8] by the learned senior counsel for the respondent to submit that the arbitral tribunal's reading of the contractual documents is reasonable, plausible and in accordance with the tests laid down in ***Nabha Power*** (supra). It is submitted that treating the P&IDs dated 26.07.2016 and the MoM as the final concluded contract leads to an irrational and non-commercial understanding of the contract documents. It is further submitted that if the said documents were the final concluded documents, the petitioner would not have issued the subsequent P&IDs, and it would not have continued to perform without raising any objections, and also, the subsequent agreement dated 20.01.2017

[8](2018) 11 SCC 508, Para 49

would be rendered meaningless. It is further submitted that the petitioner cannot rely upon some documents in the chain of transaction while ignoring the others.

a. Reference is also made to the two POs, collectively of Rs.71 crores, to indicate that under "*Scope of Supply*", the PO records "*The supply/erection and commissioning of equipment piping instrumentation material, electrical material of our LPJ Project as per your offer dated 30.08.2016 and as per P&IDs dated 26.07.2016*". It is submitted that hence, the POs required the petitioner to execute the project based on the P&ID's dated 26.07.2016 and the P&ID's dated 20.08.2016 which are incorporated in the offer, and therefore tribunal's view is correct and possible.

62. In view of the aforesaid submissions, it is submitted on behalf of the respondents that the impugned award does not warrant any interference by this court and is a well-reasoned award.

ANALYSIS AND CONCLUSION

63. At the outset, it is necessary to examine the contractual framework between the parties to ascertain whether the award is consistent therewith or not. The minutes of the meeting dated 15.09.2016 are instructive in this regard. The said minutes were executed between the parties setting out the scope of work awarded to the petitioner/claimant in connection with the work in question. The said minutes of the meeting dated 15.09.2016 read as under:-

"*MINUTES OF MEETING dated 15.09.2016*

Persons present from OTSUKA	*Persons present from TRANS*
1. YolchiNishioka	*1. Mr SilkanthaSahu*
2. Mr Yemade Takao	*2. Ms SudeshnaSahu*

3. Dr Arun Malhotra
4. Pratul Gupta

1. The turnkey job has been awarded to Trans Engineers India PvtLtd. in lumpsum for 710 Million INR based ***on P&IDs Finalised by 26th July 2016****, for ongoing Lion Project as per the scope of work defined based on which offer was submitted by Trans Engineers. No extra amount will be charged by Trans for smaller modifications.* ***However, for any major modifications incorporated in P&IDs after 26 July 2016, Trans will charge extra amount on mutually agreed rates.***

2. Above turnkey job is inclusive of transportation charges CIF Otsuka site.

3. BSR equipments, piping, structure, instrumentation, electrical, etc have been included in the order awarded to Trans.

4. Mechanical completion of E Process shall be 16 July 2017.

5. Mechanical completion of S Process shall be 30 June 2017.

6. Mechanical completion of C Process shall be 30 July 2017.
7. Mechanical completion of tank farm shall be 30th July 2017.

8. E Process safe area will be completed in all respects including building, electrical, Instrumentation, cabling, wiring connections. DCS loop checking, etc by 30th June 2017 so as to start water trials.

9. S&C Process safe area will be completed in all respects including building, electrical. instrumentation, cabling, wiring connections DCS loop checking, etc by 30 June 2017 and 31 July 2017 respectively so as to start water trials. Tank farm will be completed in all respects by 30th June 2017 for S Process and 31 July 2017 for C Process so as to start water trials.

10. Penalty clause: Penalty @ 0.5% per week will be levied if Trans is unable to finish the complete job by 30 July 2017 for water trials. In case Trans completes the complete Job before 30 July 2017, bonus of 0.5% per week shall be paid to Trans by Otsuka.

11. Trans to modify the existing project schedule according to the summarised project schedule prepared today & is attached for reference."

64. It is noted that the aforesaid minutes of meeting specifically records that the turnkey job awarded to the petitioner/claimant was based on the P&IDs finalised by 26.07.2016. This is despite the fact that the offer dated 30.08.2016, referred to the P&IDs dated 20.08.2016. The summary sheet enclosed alongwith the said offer dated 30.08.2016 reads as under:-

Sr. No.	*DESCRIPTION*	*MANUFACTURING & SUPPLY*	*INSTALLATION*
1.	*ANNEXURE-I EQUIPMENTS*	*₹252,600,000*	*₹ 29,200,000*
2.	*ANNEXURE-II : PIPING SYSTEM*	*₹266,500,000*	*₹ 71,000,000*
3.	*ANNEXURE-III: ELECTRICAL*	*₹92,000,000*	*₹16,000,000*
4.	*ANNEXURE-IV INSTRUMENTATION*	*₹48,000,000*	*₹7,000,000*
	TOTAL BASIC	*₹659,100,000*	*₹123,200,000*
	Add Excise Duty @ 12.5%	*₹82,387,500*	*0*
	Sub Total	*₹741,487,500*	*0*
	Add Service Tax @ 15%	*0*	*₹18,480,000*
	Add Sale Tax CST @ 2% against 'C' Form	*₹14,829,750*	*0*
	Total Amount	*₹756,317,250*	*₹141,680,000*

65. There were four annexures to the said offer dated 30.08.2016 viz. for "Equipments", "Piping system", "Electrical" and "Instrumentation". Each of the aforesaid annexures referred to the P&IDs dated 20.08.2016.

66. Undisputedly, the P&IDs dated 20.08.2016 was of a later vintage than P&IDs dated 26.07.2016. Yet, despite the fact that the offer dated

30.08.2016 was predicated on the P&IDs dated 20.08.2016, when minutes of meeting dated 15.09.2016 came to be issued (setting out the scope of work), there was a specific reference to work being performed "based on the P&ID finalised by 26.07.2016". Further, it was mentioned that for any major modification incorporated in the P&IDs after 26.07.2016, the petitioner/claimant will charge extra amount on mutually agreed rates. The same clearly reflected the understanding between the parties.

67. Thereafter, two POs came to be issued on 16.09.2016. One for supply of "Equipments", "Piping system", "Electrical" and "Instrumentation"; and the other for erection/commission work (with regard to which there is no dispute). The terms and conditions enclosed alongwith the POs dated 16.09.2016 for supply of equipment, piping system and instrumental material and electrical material for the project in question, make specific reference to "offer No. TEIPL/OCIL/Q-080 dated 30.08.2016 and P&ID dated 26.07.2016". It can be seen that the purchase orders consciously omit to make a reference to the P&IDs dated 20.08.2016. Further, the amount which is mentioned in respect of "Equipments", "Piping system", "Electrical" and "Instrumentation" is at variance with the amount mentioned for these items in the offer dated 30.08.2016. The relevant amount mentioned in the purchase order that came to be actually issued on 16.09.2016 is as under:-

S. No.	*Description*	*Amount*
1.	*Equipments*	*239,333,570.00*
2.	*Piping System*	*228,202,963.00*
3.	*Instrumentation Material*	*86,888,889.00*

4.	*Electrical Material*	*45,381,818.00*
	Total	*59,98,07,240.00*
In Words:-	*Total INR Five Hundred Ninety Nine Million, Eight Hundred Seven Thousand, Two Hundred and Forty Only.*	

68. Had the purchase order been based on the P&IDs dated 20.08.2016, there was no reason to omit to mention the same in the purchase orders that actually came to be issued.

69. Further, in the Agreement dated 20.01.2017 that came to be finally executed between the parties, the following was specifically provided in the clause 12.2 thereof:-

> *"12.2 If compliance with the Owner's instructions involves change in scope of work, variation and modifications beyond the contractual terms, the Owner will pay to the Contractor the price of the said extra work at a mutually agreed price."*

70. Thus, any change in the scope of work/variation/modification was to entail a payment of an additional amount for the said extra work "at mutually agreed price". Schedule 5 of the said Agreement dated 20.01.2017 which deals with the "contract payment and payment schedule" incorporates the same table which forms part of the purchase order dated 16.09.2016 (which in turn refers to P&IDs dated 26.07.2016) and is reproduced hereunder:-

S. No.	*Description*	*Amount (INR)*
1.	*Equipments*	*239,333,570.00*
2.	*Piping System*	*228,202,963.00*
3.	*Instrumentation Material*	*86,888,889.00*
4.	*Electrical Material*	*45,381,818.00*

	Total	*INR 599,807,240.00*
In Words:-	*Total INR Five Hundred Ninety Nine Million, Eight Hundred Seven Thousand, Two Hundred and Forty Only.*	

71. Clause 5 of the said Schedule specifically provides that costs of all changes or variation as instructed by the owner will be added or deducted from the contract price by variation order. Such extra or reduced cost will be arrived on the basis of mutually agreed procedures/rates, for which purpose, the contractor shall assist the owner by providing all documentary evidences.

72. It is evident that the value of "Equipments", "Piping system", "Electrical" and "Instrumentation" was Rs.59,98,07,240/-. The same was specifically incorporated, both in the agreement dated 20.01.2017 as also in the PO dated 16.09.2016, which in turn expressly referred to the P&IDs dated 26.07.2016.

73. Crucially, when the revised PO dated 15.11.2017 came to be issued on account of applicability of GST in lieu of the service tax, the said PO dated 15.11.2017 also contained a specific reference to the PO dated 16.09.2016. Thus, the contract between the parties was predicated on the PO dated 16.09.2016, which itself is predicated on the P&IDs of 26.07.2016. Although the offer dated 30.08.2016 refers to P&ID of a later date viz. 20.08.2016, in the POs dated 16.09.2016 that came to be finally issued, as also in the minutes of meeting dated 15.09.2016 that were prepared contemporaneously, there was an express reference to the P&IDs dated 26.07.2016. There was, thus, no ambiguity that the P&IDs dated 26.07.2016

formed the basis of the contract, and any additional work/ variation/ modification was to entail additional payment.

74. In these circumstances, it is quite evident that although an offer came to be made by the petitioner/claimant on 30.08.2016 based on the P&IDs dated 20.08.2016, the purchase order dated 16.09.2016 which was finally issued, was based on the P&IDs dated 26.07.2016. Had there been any relevance of the P&IDs dated 20.08.2016 for the purpose of assessing whether any additional work was performed, there is no reason as to why the POs that came to be eventually issued, would omit to make a specific reference to the said P&IDs dated 20.08.2016.

75. Despite the above position, as is evident from the bare perusal of the contractual framework, the impugned award finds as under:-

> *"56. After considering the submissions made by Ld. Counsel for the parties and examining the evidence on record* ***I find that the plea of the Claimant that the Project was to be executed on the basis of the P&ID of 26.07.2016 only and the offer made by the Claimant on 30.08.2016 and the P&ID's of 20.08.2016 attached to the said offer had no relevance cannot be accepted.*** *It is clearly shown on record that the P&ID's of 26.07.2016 were base drawings only on the basis of which the work was to start and these were subject to revisions from time to time as per the requirements of the Project.* ***Actually there were several revisions to the P&ID's of 26.07.2016 and upon every revision the earlier P&ID became redundant****. The P&ID's were being revised up to the end of 2017. It is seen that the offer dt.30.08.2016 was never rejected by the Respondent nor the P&ID's of 20.08.2016 were discarded. The contention of the Claimant that by reducing the price mentioned in the offer of 30.08.2016 the Respondent had made a Counter offer and as such the offer of 30.08.2016 and the P&ID's dt.20.08.2016 became irrelevant cannot be accepted.* ***It is clear that P&ID's of 20.08.2016 were final and the offer dt.30.08.2016 was the foundation of Agreement dt.20.01.2017****. The reduction in the price of the Contract was on account of the negotiations between the parties based on the P&ID's of 26.07.2016 and the Purchase Orders of 16.09.2016 in which Offer dt.30.08.2016 was mentioned. The Claimant was demanding a total price of*

Rs.89.79 Crores which after negotiations was reduced to Rs.71 Crores. It was agreed to by the Claimant also. Ld. Counsel for the Respondent has shown that the actual reduction in the price was not to the tune of Rs.18 Crores but it was actually about Rs.7 Crores only in as much as in the amount of Rs.89 Crores demanded by the Claimant all taxes were included. However, while reducing the total price to Rs.71 Crores the Respondent took upon itself the burden of the taxes payable on the total amount of the price and as such the reduction after negotiations was of Rs.7 Crores only. ***It is therefore clear that the parties had not given a go bye to the offer of the Claimant dt.30.08.2016 and the P&ID's of 20.08.2016.***

57. Ld. Counsel for the Respondent has relied upon a Book titled "Piping and Instrumentation" written by Moe Toghral in which it was clearly explained that the P&ID's are a basic document which can be reviewed as and when required and these keep on developing and changing during the execution of the work. It is done to ensure that a Project is completed and made operational to the satisfaction of the parties. Therefore, the contention of the Claimant that the P&ID's of 26.07.2016 were final and the only P&ID's on the basis of which the price of the Project was fixed and if any work was executed beyond these P&ID's the same was liable to be paid separately by the Respondent cannot be accepted.

58. In the Cross-Examination of CW-1 as well as RW-1 ***it has come out that various equipments for which the Invoices were raised by the Claimant to Claim the amount under Claim-A were either reflected in the P&ID's of 26.07.2016 or in the Offer dt.30.08.2016 which was based on the P&ID's of 20.08.2016****. Even the Purchase Orders dt.16.09.2016 define the scope of work based on the Offer dt.30.08.2016 and the P&ID's of 26.07.2016 and as such it cannot be said that the Offer dt.30.08.2016 and the P&ID's of 20.08.2016 were not part of the Contract between the parties. In the Purchase Order dt.15.11.2017 even the PO's of 16.09.2016 were referred to.* ***The Respondent has proved on record a Chart Exh.Rw-1/186 which shows that the Equipments shown by the Claimant as "extra" were either reflected in the P&ID's of 26.07.2016 or the Offer dt.30.08.2016 based on the P&ID's of 20.08.2016.*** *This Chart clearly shows that the Claimant was executing the work in the Project not only on the basis of the P&ID's of 26.07.2016 but the P&ID's of 20.08.2016 also which were part of the Offer dt 30.08.2016. Testimony of RW-1 proves on record that almost 90% of the Equipments claimed as "extra" by the Claimant were reflected in the P&ID's of 26.07.2016 or the Offer dt.30.08.2016 and the P&ID's of 20.08.2016. In his Cross-Examination even CW-1 admitted that various items shown as "extra" and included in Proforma Invoice. No.9 were there in the P&ID's of 26.07.2016 also. I am therefore of*

the considered view that the P&ID's of 26.07.2016 were only basic P&ID's which were open to revisions from time to time and the Offer dt.30.08.2016 and the P&ID's of 20.08.2016 were also part of Contract. In Answer to Question No.78 CW-1 admitted that the Purchase Orders issued by the Respondent were based on the P&ID's of 26.07.2016 and the Offer dt.30.08.2016 which had updated P&ID's of 20.08.2016. The LoI issued by the Respondent on 15.09.2016 which was followed by Purchase Orders of 16.09.2016 had a Schedule which was made part of Agreement dt.20.01.2017. Clause 7 of this Agreement shows that the Agreement dt.20.01.2017 was the concluded Contract between the parties and was based on P&ID's prepared earlier and revised from time to time. The work had started on 16.09.2016 prior to the execution of Agreement dt.20.01.2017. This Agreement had formalized the understanding between the parties and had mentioned GFC Drawings for execution of work which indicates that the GFC Drawings were the final understanding of the work between the parties. This Agreement contained full details of the work to be executed by the Claimant and was for the fixed price of Rs.71 Crores. Had any additional work been included in this Agreement or the revision in P&ID's had resulted in Major additional work the Claimant would have insisted for revision of the Price in this Agreement which was settled in August 2016 only."

76. It is evident from the above that the impugned award concludes that:

(i) The offer dated 30.08.2016 was the foundation of the agreement dated 20.01.2017.

(ii) The parties had not given a "go-by" to the offer dated 30.08.2016 and the P&ID dated 20.08.2016.

(iii) The claimant was executing the work in project not only on the basis of P&IDs dated 26.07.2016, but also on P&IDs dated 20.08.2016.

77. The above conclusion of the arbitral tribunal is irreconcilable with the position emanating from a bare perusal of the Minutes of Meeting dated 15.09.2016; the POs dated 16.09.2016 and the Agreement dated 20.01.2017 (which itself was pursuant to the POs dated 16.09.2016). It is evident that the impugned award completely misdirects itself in posing the question

whether "P&IDs" of 20.08.2016 had any "relevance" or whether they had been given a "go-by". The question that was required to be answered was whether performance of any additional work is required to be assessed based on the P&IDs of 26.07.2016 or the P&IDs of 20.08.2016. The relevancy of P&IDs dated 20.08.2016, or any subsequent version of the P&IDs for that matter, was not an issue inasmuch as it is the common case of the parties that the P&IDs were revised from time to time to incorporate the requirement of the respondent in respect of work to be executed.

78. The impugned award itself notes that the P&IDs were susceptible to revision from time to time and on every revision that was made, the earlier P&IDs became redundant. This itself shows that reference to the P&IDs dated 26.07.2016 (instead of P&IDs dated 30.8.2016) in the POs dated 16.09.2016, was a conscious decision for the purpose of prescribing the baseline obligations under the contract, with reference to which the quantum of additional work (if any) was to be assessed. It is notable that the statement of defence filed by the respondent itself acknowledges that "P&IDs of 26.07.2016 were the base drawings which broadly defined the scope, purpose and intent of the Lion Project".

79. The award also notices that the revision to the P&IDs is occasioned on account of additional/change/requirement for equipment etc., that have to be incorporated in connection with the work. The obvious intention behind omitting to make a reference to the P&IDs dated 20.08.2016 in the POs dated 16.09.2016 that came to be eventually issued, was to give effect to the understanding/agreement that the P&IDs of 26.07.2016 would serve as the base drawings and that any variation therefrom/additional work would entail

extra payment. This was also categorically mentioned in the minutes of meeting dated 15.09.2016.

80. The impugned award completely fails to take into account the aforesaid fundamental framework and background of the agreement between the parties, and instead proceeds to virtually re-write the contractual framework by holding that the P&IDs dated 20.08.2016 were the "foundation of the agreement between the parties".

81. This Court is conscious of the limited scope of interference with an arbitral award under Section 34 of the A&C Act, and the settled position that while scrutinising an arbitral award on the touchstone of Section 34 of A&C Act, it is impermissible to embark upon re-appreciation of factual findings rendered by an arbitral tribunal. However, the law is equally well-settled that where the findings/conclusions rendered in the arbitral award are based on no evidence and/or are perverse on the face of it, the same renders the award vulnerable to challenge.

82. In the present case, the misreading/misunderstanding of the basic contractual framework vitiates the award at its root, and renders it vulnerable to challenge under Section 34(2)(b)(ii) and 34(2A) of the A&C Act.

83. Recently, the Supreme Court in ***DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.,***[9] has held as under:

> *"46. Interference with an arbitral award cannot frustrate the "commercial wisdom behind opting for alternate dispute resolution", merely because an alternate view exists. 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' agency, should be given full effect. If the interpretation of the*

[9] (2024) 6 SCC 357

terms of the contract as adopted by the Tribunal was not even a possible view, the award is perverse."

84. In ***Ssangyong*** (supra), it has been held as under:

> *"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 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)."*

85. In ***Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum***[10], it has been held as under:

> *"43. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract.*
>
> *44. However, a distinction has to be drawn between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a contract, while adjudicating a dispute. An error in interpretation of a contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.*
>
> *45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one.*
>
> *46. In Associate Builders, this Court held that an award ignoring the terms of a contract would not be in public interest. In the instant case, the award in respect of the lease rent and the lease term is in patent disregard*

[10] (2022) 4 SCC 463

of the terms and conditions of the lease agreement and thus against public policy. Furthermore, in Associate Builders the jurisdiction of the Arbitral Tribunal to adjudicate a dispute itself was not in issue. The Court was dealing with the circumstances in which a court could look into the merits of an award."

86. In ***Satyanarayana Construction Co. v. Union of India***,[11] it has been held as under:

> *"11. ...It was not open to the arbitrator to rewrite the terms of the contract and award the contractor a higher rate for the work for which rate was already fixed in the contract. The arbitrator having exceeded his authority and power, the High Court cannot be said to have committed any error in upsetting the award passed by the arbitrator with regard to Claim 4."*

87. This Court in ***Union of India v. Jindal Rail Infrastructure Ltd***.,[12] has held as under:

> *"69. A commercial contract between the parties cannot be avoided on the ground that one of the parties subsequently finds it commercially unviable to perform the same. The Arbitral Tribunal has, essentially, re-worked the bargain between the parties and rewritten the contract. This is, clearly, impermissible.*
>
> *70. In PSA SICAL Terminals Pvt. Ltd v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin (supra), the Supreme Court observed as under:—*
>
> > *"87….In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category."*
>
> *71. There is no dispute that the interpretation of a contract falls within the jurisdiction of an arbitral tribunal and an arbitral award based on a plausible interpretation of a contract cannot be interfered with under the provisions of Section 34 of the A&C Act.*

[11] (2011) 15 SCC 101
[12] 2022 SCC OnLine Del 1540

72. <u>However, in this case, this Court is unable to accept that the Arbitral Tribunal's interpretation of Clause 2.4 of the Agreement (renumbered as Clause 2.8 of the Agreement), is a plausible one.</u>"

88. The misreading of the basic contractual framework of the contract between the parties also vitiates the subsequent examination/evaluation done in the impugned award so as to the additional work claimed to have been carried out by the petitioner. Thus, for instance, the arbitral tribunal renders a finding in para 58 of the impugned award to the effect that the "*equipment shown by the claimant as "extra" were either reflected P&IDs dated 26.07.2016 or the offer dated 30.08.2016 based on P&IDs dated 20.08.2016*". Apart from the fact that the inclusion of some items in the P&IDs dated 20.08.2016, would not by itself disentitle the petitioner to raise a claim for additional work/s given that the petitioner's baseline obligation was in terms of the P&IDs of 26.07.2016, it is also inexplicable how this finding was reached without the P&IDs dated 20.08.2016 even being on record before the Arbitral Tribunal.

89. Similarly, a finding has been rendered in para 45 of the impugned award that the "*Testimony of RW1 proves on record that almost 90% of the equipments claimed as extra by the claimant were reflected in P&IDs of 26.07.2016 or the offer dated 30.08.2016 based on the P&IDs 20.08.2016*". Once the Arbitral Tribunal reached the conclusion (erroneously) that the P&IDs of 20.08.2016 were relevant for the purpose of assessing extra/additional work, at the very least, the said P&IDs (dated 20.08.2016) should have been directed to be placed on record.

90. The impugned award loses sight of the fact that the P&IDs dated 20.08.2016, though a basis of the offer dated 30.08.2016, was consciously

not made the basis for issuance of PO dated 16.09.2016 which was finally issued upon the petitioner/claimant. The parties consciously chose to make the P&ID drawings of 26.07.2016, as the basis of the purchase orders issued to petitioner/claimant.

91. It is notable that while considering the counter claim raised by the respondent, the arbitral tribunal itself renders the following findings:-

> *"73. After considering the submissions made by Ld. Counsel for the parties and going through the evidence on record I am of the considered view that* ***the delay in the completion of the work was mainly on account of continuous revisions in the P&ID's which the Claimant was bound to abide in terms of the Agreement dt.20.01.2017 between the parties****. The Claimant could not say no to the revisions and could not refuse to continue with the work on account of the revisions carried out in the P&ID's. The Certificate dt.25.07.2017 regarding completion of the work was a fictitious document prepared for presentation in the inaugural function as it is established on record that even after this date the Claimant was working at the site and its staff was executing the work up to April, 2018. It is noteworthy that the Respondent never raised any serious objection in regard to the delay in the execution of the work by the Claimant which shows that the Respondent was also conscious of the reasons and circumstances contributing to the delay in the completion of the work."*

92. Thus, the award takes cognizance of the fact that there were continuous revisions in the P&IDs which the petitioner/claimant was bound to abide with. Necessarily, any increase of scope of work on account of these revisions, entailed entitlement for additional payment, which was required to be assessed based on the comparison with the P&ID drawings on 26.07.2016 *viz-a-viz* the final P&ID drawings.

93. It is also seen that the award itself acknowledges execution of "additional work". Para 62 of the impugned award notes that the petitioner/claimant had failed to prove that the alleged additional work

performed by the petitioner was "major" in nature. Further, it is mentioned that the petitioner had failed to establish the price of the additional work and also finds that there was no justification for belatedly demanding additional amount for work additionally performed. Para 38 of the award records the contention of the petitioner/claimant to the effect that the measurement of the work was signed by both the parties. Further, in an email dated 03.05.2018 sent by the petitioner/claimant to the respondent, the claimant had stated that additional work had been done as per the requirement of the project and with the approval of the respondent, but there was no reply to the said email. In fact, the execution of the additional work was not denied by the respondent till the claimant invoked arbitration *vide* notice dated 07.09.2018.

94. Attention has also been drawn during the course of arguments to various emails exchanged between the parties in March 2018, whereby the respondent sought detailed information to verify the claims sought to be raised by the petitioner. It also transpires that a "without prejudice offer" for payment of Rs.3,00,00,000/-, also came to be made by the respondent to the petitioner.

95. In this background, it cannot be said, that the claim is vitiated on account of the fact that the payment towards alleged additional work was demanded belatedly by the petitioner. In any event, whether or not any additional work was performed and/or whether the amount claimed has been proved or not has to be assessed by taking note of the correct contractual framework, which the arbitral award omits to do. This vitiates the arbitral award in its entirety.

96. In the above circumstances and for the foregoing reasons, this Court finds that the impugned award is unsustainable and is therefore set aside. All pending application/s also stand disposed of.

SACHIN DATTA, J

JULY 22, 2024 *dk, hg, at*