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

Judgment reserved on: 21.05.2025

Judgment pronounced on: 21 .08.2025

\+ **O.M.P. (COMM) 529/2020 & I.A. 10230/2020**

BHARAT HEAVY ELECTRICALS LIMITED (BHEL)

.....Petitioner

Through: Mr. Arvind Chaudhary, Mr. Vinay Kumar & Mr. Sachin Chaudhary, Advs.

versus

XIAMEN LONGKING BULK MATERIAL SCIENCE & ENGG. CO. LTD. .....Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for brevity "*the Act*") challenging the Arbitral Award dated 03.07.2020 passed by the learned arbitrator in the arbitration matter titled as "*Xiamen Longking Bulk Material Science & Engg. Co. Ltd. v. Bharat Heavy Electricals Limited (BHEL)*".

FACTUAL BACKGROUND

2. The brief facts of the case as per the petitioner are that the petitioner is a public sector undertaking and the respondent is a foreign company incorporated under the laws of the People's Republic of China.

3. On 17.07.2015, the petitioner floated a tender and the respondent participated in the same.

4. As part of the bidding process, on 25.04.2016, the respondent had submitted a Project Execution Methodology (for brevity "*the PEM*"), in which the respondent assured the petitioner that it could supply the equipment and for local supplies, it stated it would either open an office in India or partner with an Indian firm to handle supply, erection and commissioning of the Mill Reject System (for brevity "*the MRS*"). The two salient conditions of Clause 1 of the PEM were that the respondent will set up a local office in India and open an Indian bank account to facilitate the execution of the contract.

5. Based on the same, the petitioner issued three Letters of Award (for brevity "*the LoA*") in favour of the respondent dated 01.12.2016.

6. On 14.12.2016, the respondent sent its letter of acceptance to the LoA issued by the petitioner.

7. Thereafter, on several occasions, the respondent failed to open a local office in India and did not furnish details of an Indian bank account or local tax registrations as proposed in the PEM. Instead, the respondent proposed that it can be permitted to use the office and the bank account of an associated Indian company, namely, M/s Longking Engineering India Pvt. Ltd. To which, the petitioner denied and insisted on strict adherence to the PEM.

8. The respondent insisted upon the petitioner to issue the Purchase Orders, however, the same could not have been issued until the

respondent had opened its India office and an Indian bank account. This requirement existed because the Purchase Order must necessarily carry the local Indian address of the seller along with its bank details for remittance of payments, in accordance with the terms of the Purchase Order.

9. The respondent sent an e-mail dated 03.06.2017 stating that if it is not allowed to use the bank account of M/s Longking Engineering India Pvt. Ltd., then it cannot continue the execution of the contract. The said e-mail is reproduced as under:

> *"Dear Gaurav,*
>
> *This is w.r.t. your mail dtd 2017/05/26 and here is our response.*
>
> *According to the previous email, we received the LOAs from BHEL dtd 2016/12/02. At the same time, we were negotiating with your company many times for the issue of receiving rupee. And then we proposed to use the account of M/s Longking Engineering India to receive rupee and issued a conditional acceptance of LOA (refer to the mail dtd 2016/12/14), but your company did not accept at that time.*
>
> *In the spirit of friendly cooperation with BHEL, we accepted the LOAs on December 27, 2016.*
>
> *When we visited BHEL-PSSR and BHEL-PEM in January and April 2017, your people verbally agreed that Xiamen Longking could sign a JV with Longking India, then the account of receiving rupee shall be the account of M/s Longking Engineering India Pvt. Ltd. And as you know, both Xiamen Longking and Longking India belong to the same parent company.*

However, after we prepared all the documents with Longking India, in the mail dtd 2017/05/26, you denied the JV with Longking India and informed that the PO & WO have to be issued in the name of M/s Xiamen Longking Bulk Materials Science and Engg. Co. Ltd. and all legal and financial registrations in the name of M/s Xiamen Longking Bulk Materials Science and Engg. Co. Ltd. only can be accepted.

We have tried a lot of times on opening the bank account of Xiamen Longking but it is still not feasible.

In a word, we hope BHEL will consider the actual situation of our company and agree us to use the account of M/s Longking Engineering India to receive rupee. Otherwise, we have no way to continue the execution of the project."

10. On 17.07.2017, the petitioner issued a communication to the respondent invoking the "risk and cost" clause under the contract.

11. On 30.11.2017, the petitioner issued a letter to the respondent, stating that an amount of Rs. 2,12,47,107.40/- was recoverable on account of the risk and cost amount. The letter further stated:

"*This is to inform you that, since you have failed to honour and deliver as per the provisions of the contract referred to in the subject line, we have initiated procurement of the said material from an alternate source.*"

12. On 14.12.2017, the respondent sent a letter questioning the cancellation of contract by the petitioner and thereafter, on 12.10.2018, the respondent invoked the arbitration clause of the General Conditions of Contract (for brevity "*the GCC*"), being Clause 32.1, which reads as under:

"32. ARBITRATION

32.1 In the event of any dispute or difference arising out of execution of order/ contract or the respective rights and liabilities of the parties or in relation to interpretation of any provision by Seller/ Contractor in any manner touching upon order/ contract, such dispute or difference shall (except as to any matters, the decision of which is specifically provided for therein) be referred to the arbitration of the person appointed by the competent authority of Purchaser.

Subject as aforesaid, the provisions of Arbitration and Conciliation Act, 1996 (India) or statutory modifications or reenactments thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause. The venue of arbitration shall be at New Delhi."

13. The respondent raised the following claims before the learned arbitrator:

S. No.	Particulars/Claims	Amount (In INR)
i.	Preparation of bid.	26,95,000/-
ii.	Design and engineering cost.	29,75,000/-
iii.	Cost of preparation of 65 drawings.	13,65,000/-
iv.	Copyright fee.	52,50,000/-
v.	Travel expenses.	17,50,000/-
vi.	Public management fee.	10,50,000/-
vii.	Loss of profit and overhead for unexecuted work of contract.	83,27,768/-
viii.	Pre suit pendente lite and future interest @ 18% p.a. on all claims.	
ix.	Cost of Arbitration and Litigation	70,00,000/-

	TOTAL AMOUNT CLAIMED	3,04,12,768/-

14. The petitioner filed a counter-claim on account of risk and cost amount equivalent to Rs. 2,12,47,107.04/- and litigation cost of Rs. 35,00,000/-. Thus, the total amount claimed by the petitioner by way of its counter claims was Rs. 2,47,47,104.04/-.

15. On 03.07.2020, the learned arbitrator passed the impugned arbitral award, wherein the learned arbitrator directed payment of a sum of Rs. 13,65,000/- along with pendente lite and future interest @ 6% per annum with effect from 01.01.2019 till realisation, towards the cost of preparation of 65 drawings, including the cost of draftsman, printing and preparation charges.

16. The relevant paragraphs of the impugned arbitral award read as under:

> *"100. I find that the claimant has considered it to be an opportunity to claim a huge amount from the respondent. However, all the same, it (the claimant) is entitled to claim the amount under clause (C). It is Rs. 13,65,000/(Rupees Thirteen Lakhs Sixty Five Thousand Only) being the cost of preparation of 65 drawings. It is a fact that the 65 drawings submitted by the claimant were neither returned nor rejected. The claimant is justified to claim this particular amount.*
>
> *...*
>
> *119. The claimant is accordingly awarded interest @ 6% per annum on Rs. 13,65,000/- (Rupees Thirteen Lakhs Sixty Five Thousand Only) from 01.01.2019 till the payment is made."*

17. Aggrieved by the impugned arbitral award, the petitioner has filed the present petition.

SUBMISSIONS ON BEHALF OF THE PETITIONER

18. Mr. Chaudhary, learned counsel for the petitioner, states that the impugned arbitral award is ex facie illegal, arbitrary and passed without the application of the judicial mind and is therefore liable to be set aside.

19. It is stated that the impugned arbitral award is against both the settled principles of law and the facts on record. The learned arbitrator, being a creature of the contract, could not travel beyond its express terms, yet has done so by giving an interpretation to the contract and the communications exchanged between the parties that is extraneous to the record. This renders the award irrational and perverse.

20. The specific instances of such deviation are as follows:

A. The findings in paragraph 63 of the impugned arbitral award are contrary to the PEM.

B. The conclusion that payment was to be made after execution of the contract is contrary to the contractual terms.

C. The finding regarding the person representing the respondent, in paragraph 37 of the impugned arbitral award, is inconsistent with the documents placed on record, despite the said person having appeared as a witness.

D. The learned arbitrator erred in holding that time was not the essence of the contract, in paragraphs 54 and 55 of the impugned arbitral award, despite the LoA, the GCC and the Special Conditions of Contract specifically stipulating otherwise.

21. Reliance is placed on the following judgments to submit that the learned arbitrator cannot render findings contrary to contractual terms:

A. ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131;***

B. ***Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644;***

C. ***Shri Lal Mahal Ltd. v. Progetto Grano SpA, (2014) 2 SCC 433;*** and

D. ***Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1.***

22. It is further stated that the impugned arbitral award is against the public policy of India and suffers from violations of the principles of natural justice. In particular, the reliance by the learned arbitrator on the Note to Clause 9.6 of the GCC, in paragraphs 77 and 79 of the impugned arbitral award, is arbitrary, as the respondent never pleaded or argued that it sought payment through a Letter of Credit (for brevity "*an LC*"). The parties were given no opportunity to present arguments on this issue. Once the parties had agreed that the respondent would open an Indian bank account in compliance with the Reserve Bank of India (for brevity "*the RBI*") guidelines, the matter was not open to reinterpretation by the learned arbitrator.

23. The learned arbitrator failed to appreciate the contentions of the petitioner, the facts of the case and specific clauses of the contract, including the PEM agreed between the parties. Under the PEM, opening of a project office in India for execution of the Indian component, as per the RBI guidelines, was a pre-requisite. The Indian and foreign components of the contract were not severable, making this a mandatory condition for execution. The respondent itself had proposed to set up an Indian office and open an Indian bank account to receive Indian Rupee, instead of opting for an LC. The finding of the learned arbitrator that payment could have been made through an LC or that meetings could have been arranged via video conference is beyond

the pleadings, arbitrary and whimsical, especially when such an argument was never raised by either party.

24. The learned arbitrator ignored the vital evidence of the incapacity of the respondent and refusal to fulfil its obligation to open a project office and an Indian bank account for receiving Indian Rupee (*vide* email and letter dated 23.01.2017). Instead, the respondent sought to use the bank account of a third party, M/s Longking Engineering India Pvt. Ltd., a complete stranger to the contract. At no stage was it agreed that payment could be made through an LC. It is impermissible in law to remit contractual payments to a third party unconnected with the contract.

25. The learned arbitrator failed to appreciate the evidence of the witness of the petitioner, who categorically stated that the details of the Indian office and bank account were required before issuance of the Purchase Order. This critical evidence was overlooked, resulting in an erroneous finding.

26. The learned arbitrator failed to appreciate that the contract stood repudiated by the email dated 03.06.2017 sent by the respondent, wherein it expressly refused to continue execution unless allowed to use the bank account of M/s Longking Engineering India Pvt. Ltd. for receipt of the Rupee component. Following this, the petitioner, by letter dated 17.07.2017, invoked the risk-and-cost clause and accepted the repudiation. The learned arbitrator ignored Section 39 of the Indian Contract Act, 1872 (for brevity "*the ICA*"), which entitles the promisee to terminate the contract upon such refusal or inability to perform. Reliance is placed on ***Ashling v. L.S. John, (1984) 1 SCC 205*** and ***Jawahar Lal Wadhwa & Anr. v. Haripada Chakraborty, (1989) 1 SCC 76.***

27. Furthermore, the award of Rs. 13,65,000/- towards design and engineering costs is based on no evidence. The calculation was arbitrarily derived from total employee salaries for a certain period, on the assumption that the employees were exclusively engaged on this project. This assumption is irrational and unsupported. Out of 65 drawings submitted by the respondent, only 18 were approved by the petitioner. The contract required detailed engineering drawings to be approved and many initial submissions required significant revisions. Unapproved drawings, being of no utility to the petitioner, could not have formed the basis for any award.

28. In addition, in awarding pendente lite interest future interest, the learned arbitrator failed to consider Clause 9.11 of the GCC. The learned Arbitrator relied on ***Ambica Construction v. Union of India, (2017) 14 SCC 323***, but ignored binding precedent prohibiting such award in the present circumstances, namely:

A. ***Garg Builders v. BHEL, (2022) 11 SCC 697;***

B. ***Union of India v. Manraj Enterprises, (2022) 2 SCC 331;*** and

C. ***Jaiprakash Associates v. Tehri Hydro Development Corporation India Ltd., AIR 2019 SC 5006.***

29. Lastly, on the consequences of repudiation, Section 75 of the ICA stipulates that a party rightfully rescinding a contract is entitled to compensation for damage sustained through non-performance. Since the respondent wrongfully repudiated the contract, it had no entitlement to raise claims. Further reliance is placed on Sections 57 and 60 of the Sale of Goods Act, 1930, to contend that once the respondent committed anticipatory breach, it was barred from setting up claims against the petitioner.

30. However, the learned arbitrator failed to appreciate that the inability of the petitioner to produce proof of certain payments could not negate the fact of wrongful repudiation. Moreover, the LoA issued by the petitioner to the subsequent vendor, duly placed on record, was ignored.

31. Hence, the impugned arbitral award is based on conjectures and surmises, ignoring the express terms of the contract, the pleadings and the evidence on record, rewriting the terms of the contract and thus, is liable to be set aside as it is in conflict with the public policy of India under Section 34(2)(b)(ii) of the Act.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

32. The respondent has been served in the petition and has filed its reply to the petition. *Vide* the Order dated 30.04.2025 passed by this Court, a court notice was served to the respondent at their e-mail addresses, namely, jindi260@139.com and alex_chan1215@139.com and as per the service report, the respondent has been served. However, nobody has been appearing on behalf of the respondent. Hence, I proceed to adjudicate the present matter with the reply of the respondent already on record.

33. It is submitted that the present petition is not maintainable and is devoid of merit, as the scope of interference under Section 34 of the Act is narrowly circumscribed and none of the statutory grounds have been demonstrated. It is well settled that examination of evidence and interpretation of contractual clauses fall within the exclusive domain of the learned arbitrator, who is the final arbiter of disputes and the sole judge of the quality and quantity of evidence before him. In the present case, the learned arbitrator has duly applied his mind to the material on record and arrived at a reasoned conclusion. The objections filed

amount to a mere attempt at re-examining and re-appreciating evidence and contractual interpretation, which is impermissible under Section 34 proceedings and therefore, the impugned arbitral award warrants no interference.

34. The petitioner has admitted that the respondent is a subsidiary of Fujian Longking and that both entities are part of the same group. In 2015, the respondent, through its parent company Fujian Longking Co. Ltd., approached the petitioner and submitted documents and credentials to participate in the notice inviting tender. Copies of relevant emails annexed as Exhibit C-1 (Colly) in the arbitral record substantiates this position. Furthermore, prior to the notice inviting tender and in response to the request of the petitioner, the respondent specifically informed the petitioner of its subsidiary status and supplied supporting documents via emails dated 19.01.2016 and 06.02.2016, annexed as Exhibit C-2 (Colly) in the arbitral record.

35. It is denied that the respondent undertook to supply the MRS by opening its office in India or engaging a local partner for supplies, erection and commissioning. For the Indian component of the package, the respondent intended to establish a project office in Delhi at a later stage, which was unrelated to the foreign supply of the MRS and not a preliminary work obligation. The PEM clearly outlines the steps commencing from order acceptance. Under the LoA, MRS drawings were to be submitted by the respondent and approved by the petitioner before commencement of MRS spares supply. It is an admitted fact that the petitioner failed to approve these drawings, making it impossible to commence subsequent project activities. The LoA expressly stipulated that completion of the supply portion would be within 12 months from the date of final drawing/document approval. The learned arbitrator, in

paragraph 51 of the impugned award, has duly recorded reasons for these findings.

36. The allegation that the respondent intended only to delay and litigate is baseless. The petitioner itself failed to perform reciprocal obligations and to cooperate. As of the termination notice dated 17.07.2017, the petitioner had approved only 19 out of 65 submitted drawings. Consequently, the 12-month completion period had not commenced and the delay was entirely attributable to the petitioner. The respondent had commenced execution as per the PEM, but the petitioner hindered progress and illegally terminated the contract. The learned arbitrator addressed this comprehensively in paragraphs 59–63 of the impugned award. A conjoint reading of the LoA and Clause 9.3 of the GCC confirms that opening an Indian office or bank account was not a primary precondition for commencing work.

37. While the respondent proposed using the office and bank account of M/s Longking Engineering India Pvt. Ltd., this was consistent with the accepted conditional LoA. The respondent was still executing the project in accordance with the LoA and PEM when the petitioner illegally terminated the contract. The contention, raised for the first time in these proceedings, that purchase orders could not be issued until the respondent opened its Indian office and bank account, was neither pleaded nor argued before the learned arbitrator. No such requirement was ever communicated prior to 26.05.2017.

38. The claim that the impugned arbitral award is contrary to the public policy of India or based on an extraneous interpretation of the contract is incorrect. The reliance of the learned arbitrator on the Note to Clause 9.6 of the GCC, in paragraphs 77 and 79 of the impugned arbitral award, is sound and supported by the record. The petitioner itself

referred to Clause 9.6 in its written synopsis and arguments, to which the respondent replied and referred to the Note during oral arguments. The LoA's payment terms stipulated that 85% payment for imported supply would be released through a 60-day usance LC against receipted LR. Payment for imported items was thus to be made only through LC, rendering the insistence of the petitioner on an Indian bank account contrary to the contract.

39. As per the LoA, the supply of the main package commissioning spares and mandatory spares and the erection and commissioning of the MRS, was to be completed within 12 months from the date of final drawing approval. Since the petitioner failed to approve the submitted drawings, the delivery schedule had not commenced, making the termination illegal. Under the LoA and Clause 9.3 of the GCC, payments were due after dispatch and issuance of a Material Receipt Certificate, so opening an Indian bank account before delivery was irrelevant. In fact, the email of the petitioner dated 15.12.2016 acknowledged there was "*enough time to open the INR account… as the payments are made only after dispatches have begun*", confirming that non-opening of the account had no bearing on drawing approvals.

40. The learned arbitrator correctly held that setting up a project office was not a mandatory condition for execution. Paragraph 3 of the PEM outlines a stepwise process where setting up a site office (step 9) follows several preliminary steps, including drawing approval. The petitioner failed to place a Purchase Order on the respondent and never indicated that Indian office or bank details were required for this. The petitioner's own witness admitted that drawings for both Indian and foreign components required prior approval, which the petitioner failed to provide. The learned arbitrator rightly concluded that the non-

opening of a project office and bank account was immaterial at that stage.

41. The learned arbitrator further held that the contract was wrongly terminated by the petitioner. Emails dated 03.06.2017 and 04.06.2017 demonstrate the willingness of the respondent to continue execution. The reliance of the petitioner on Section 39 of the ICA is an afterthought and irrelevant.

42. Further, the award of Rs. 13,65,000/- towards design and engineering cost is supported by evidence, including salary slips, correspondence relating to the submission of drawings and the petitioner's own confirmation of receiving all 65 drawings. These drawings were neither returned nor rejected.

43. Lastly, the reliance on ***Jaiprakash Associates v. Tehri Hydro Development Corporation, AIR 2019 SC 5006***, is misplaced and inapplicable, having not been raised before the learned arbitrator. The award of pendente lite interest is correct and in accordance with law.

44. The learned arbitrator, after considering all evidence and submissions, allowed one claim of the respondent and rejected the counterclaim of the petitioner. The allegation that the impugned arbitral award was passed in an arbitrary manner is unfounded.

ANALYSIS AND FINDINGS

45. I have heard leaned counsel for the petitioner and perused the material available on record.

46. As is apparent from the above, the controversy that falls for consideration before this Court is whether the learned arbitrator:

A. Ignored express contractual stipulations in the LoA, GCC and PEM;

B. Rendered findings beyond the pleadings and contrary to the case of both parties; and

C. Awarded sums without evidentiary foundation.

A. Contractual Precondition of Opening a Local Office and Bank Account

B. Reliance on the Note to Clause 9.6 of the GCC – Beyond Pleadings

47. Clause 1 of the PEM, which formed part of the bid of the respondent and was accepted by the petitioner, contained clear undertakings by the respondent to open an office in India and an Indian bank account before commencement of execution of the Indian component of the contract. This was not a mere formality and it was central to compliance with the RBI guidelines and as per the law. Clause 1 of the PEM reads as under:

> *"1. Project Office:*
>
> *In order to implement the Indian component of the package, Xiamen Longking Bulk Materials Science and Engineering Co. Ltd. will establish a Project Office at Delhi, India in accordance with RBI guidelines and as per law. The Office will be staffed by Xiamen Longking Bulk Materials Science and Engineering Co. Ltd. China and Indian personnel.*
>
> *Necessary guidance monitoring and support in terms of manpower, finances etc. will be provided by Xiamen Longking Bulk Materials Science and Engineering Co. Ltd. Nationality to this office.*
>
> *The Project Office will be headed by a Project Director who will be the Officer in Charge for this package.*
>
> *All coordination with Clients will be effected by this office."*

48. The LoA explicitly incorporated the PEM, stating:

> "*(vi) For execution of contract, please refer Project Execution Methodology (attached) submitted by M/s Xiamen Longking vide email dtd 25.04.2016.*"

49. Clause 9.10 of the GCC provided for the mode of payment as under:

> *"9.10 MODE OF PAYMENT*
>
> *Payments shall be made directly to the Seller/ Contractor by E-transfer. Seller/ Contractor to provide necessary information for the same as per Annexure - VII."*

50. A conjoint reading of the PEM, LoA and GCC leaves no scope for payment to any unrelated third party or for waiver of the local office/bank account requirement without the consent of the petitioner.

51. Further, by email dated 26.05.2017, the petitioner reiterated that the issuance of Purchase Orders required the local address and bank details of the seller. The relevant paragraph reads as under:

> *"BHEL has been repeatedly expressing concern (mail dtd 03/04/2017 attached) in the inordinate delay by M/s Xiamen Longking Bulk Materials Science and Engg. Co. Ltd. in initiating the execution of the contract by establishing a project office at Delhi (India) in accordance with RBI Guidelines and as per Indian law. This is delaying placement of formal purchase order by BHEL Power Sector (Southern Region) office."*

52. The finding of the learned arbitrator that the requirement to establish a project office and bank account could be deferred until after drawing approval and even substituted by the use of a third party's bank account, is a direct departure from the contractual framework.

53. The relevant paragraph of the impugned arbitral award reads as under:

"63. Otherwise also, the question of payment of any amount by the respondent would have arisen only after the completion of the project. It was for this reason that in the email dated 15.12.2016 (Page 165 of SOC), it was asserted by the respondent that the claimant had enough time to open the INR account in the name of the claimant. The parties had been making use of the technology and were exchanging their views/requirements through emails. The respondent could have, on finding the response of the claimant that it was not having any project office in India and was requesting to allow it to make use of the office of Xiamen Longking in India, straightway informed the claimant that it would not proceed further in the matter. However, it did not do so. The non-opening of the project office and a bank account in India, in my opinion, were not necessary for proceeding further particularly when the parties had been exchanging their views through emails and only the drawings had been submitted. The discussion, if any, could have been dealt through video conferencing, which is, nowadays, in vogue. Nowadays meetings are being arranged and held through video conferencing and judicial notice of this fact can be taken. The respondent on its part, as it is a big organization, could have requested the claimant to clarify its doubts either through emails or through video conferencing or could have spelt out in an equivocal terms that it was not going to proceed further because of non-opening of the project office in Delhi. In my view, even the respondent did not take it to be a basic necessity for proceeding further."

54. The learned arbitrator held that these requirements were not necessary for proceeding further and could be substituted with electronic mails or video conferencing. Such reasoning overlooks that these obligations were not procedural conveniences but contractual pre-conditions expressly agreed upon by the parties.

55. The reliance of the learned arbitrator on the email of the petitioner dated 15.12.2016 is misplaced. The email expressly stated:

> *"Please plan kick-off meeting for the subject project and package at the earliest.*
>
> *Regarding payments in INR, you have enough time to open the INR account in the name of M/s Xiamen Longking as the payments are made only after dispatches have begun. LOAs have been issued keeping in view project execution methodology furnished by M/s Xiamen Longking.*
>
> *Unconditional acceptance of 3 Letter of Awards shall be sent per return mall Immediately for us to place the Purchase Orders.*
>
> *Any other matter can be discussed during the kick off meeting."*

This communication reinforces that the PEM obligations were acknowledged by the petitioner and formed part of the agreed project execution mechanism.

56. Further, in the communications between the parties, the respondent did not deny the obligation of opening an Indian office and bank account, instead only highlighted its inability to do so.

57. By disregarding these stipulations and denying the obligations, the learned arbitrator has in effect re-written the contract. The PEM was not ancillary, but was integral to the project framework and together with

the LoA and GCC, imposed the obligations for execution of the Indian component, including the establishment of a project office in India and the opening of an Indian bank account to receive INR payments.

58. The plain language of the PEM, when read with the e-mail dated 26.05.2017 that purchase orders must carry the local address and bank details of the seller, makes it clear that these were necessary pre-conditions for issuance of domestic purchase orders. A construction treating these obligations as optional or deferrable until after material dispatch is inconsistent with the contractual framework and the contemporaneous understanding between the parties.

59. The further view of the learned arbitrator that payment could have been arranged through an LC, by reference to the Note under Clause 9.6 of the GCC, is inconsistent with the PEM, LoA and GCC when read together. The PEM expressly contemplated direct INR payments into an Indian account of the seller and did not envisage LC arrangements as a substitute.

60. Another contention of the petitioner is that the learned arbitrator violated principles of natural justice by relying on the Note to Clause 9.6 of the GCC to conclude that payment could have been made through a Letter of Credit, which was not pleaded or argued by either parties for such a mode of payment as an alternative to the agreed bank account arrangement.

61. The relevant extract of the Note to Clause 9.6 of the GCC reads as under:

> *"9.6 ...*
>
> *Note: ...*
>
> *2) Foreign bidders can opt for payment (less agency commission, if applicable) through irrevocable and*

unconfirmed letter of credit. In that case for evaluation purpose, prices of foreign bidders will be loaded on account of payment through LC, equal to loading specified against 'Payment through Bank' in Annexure-VIII. No loading will be done if foreign vendors agree for 90 days usance LC or submit the documents on collection basis for payment within 90 days of submission of complete documents. ..."

62. The relevant paragraph of the impugned arbitral award reads as under:

"79. It is not in dispute that the claimant is a foreign bidder. The LOAs (Pages 73, and 79 of SOC) show the ex-works prices. The same are in INR as well as USD. In my view, the insistence of the respondent to have a project office in India ignoring the contents of the 'Note' to clause 9.6 on (Page 111 of SOC) was uncalled for. The respondent had been requesting the claimant to proceed. If the opening of the project office in Delhi by the claimant was of such an importance for the respondent, it should have, at the threshold, informed the claimant that there would not be any correspondence or progress in the matter unless the project office is opened in Delhi and the claimant has a bank account and other related facilities, as per law, in India."

63. However, the learned arbitrator completely ignored Annexure VIII of the GCC, mentioned in the Note to Clause 9.6, which clearly states that no deviation from GCC terms is generally acceptable and only in exceptional circumstances, the deviations are applicable. The relevant extract of Annexure VIII is reproduced as as under:

"No deviations in GCC terms and conditions are generally acceptable, and bids with deviations are liable to be rejected.

However, in exceptional circumstances, BHEL may accept deviations with Loading as given below:"

64. The case of the petitioner throughout was that the bank account in India was mandatory and the suo motu reliance of the learned arbitrator on an unpleaded ground has prejudiced the position of the petitioner. I am of the view that by introducing the Note to Clause 9.6 as a determinative factor, without affording the parties an opportunity to address it, amounts to a violation of Section 18 of the Act, which guarantees a full opportunity to present one's case. The prejudice to the petitioner is manifest as it had no occasion to lead evidence or argue whether the payment through an LC under the Note to Clause 9.6 of the GCC could replace the agreed payment mechanism under the PEM. This procedural shortcoming also vitiates the impugned arbitral award.

65. Where an arbitral interpretation conflicts with the plain contractual scheme, the Court must examine whether the view of the learned arbitrator is even a plausible one. In this case, the interpretation not only lacks plausibility but also substitutes a new contractual regime.

66. The Hon'ble Supreme Court in ***PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, (2023) 15 SCC 781,*** held that rewriting a contract for the parties breaches fundamental principles of justice, falling within the exceptional category warranting interference under Section 34 of the Act. The Court reiterated that a party cannot be made liable to perform something for which it has not contracted and unilateral alterations cannot be foisted upon an unwilling party. The relevant paragraphs read as under:

"84. After referring to various international treaties on arbitration and judgments of other jurisdictions, this Court in Ssangyong Engg. & Construction Co. Ltd. [Ssangyong Engg.

& Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , observed thus : (SCC pp. 199-200, para 76)

> *"76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral circular and by*

substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."

(emphasis supplied)

85. As such, as held by this Court in Ssangyong Engg. & Construction Co. Ltd. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has

further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, rewriting 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."

67. Similarly, this Court in ***Union of India, Ministry of Railways, Railway Board & Anr. v. Jindal Rail Infrastructure Limited, 2022 SCC OnLine Del 1540,*** held that while commercial interpretation is permissible where terms are ambiguous, it is impermissible to re-work a bargain on grounds of commercial difficulty. Altering agreed terms amounts to rewriting the contract, rendering the award in conflict with the fundamental policy of Indian law. The relevant paragraphs read as under:

"75. It is not necessary that all contracts yield a profit; some result in a loss as well. This is not a factor to permit a party to avoid its contractual obligations.

76. In cases where it is found that the terms of the contract do not clearly express the intentions of the parties, it is open to seek recourse to various tools of interpretation. This would include interpreting a contract in a manner that would make commercial sense as it is assumed that men of commerce would have intended it so. However, it is not open to re-work a bargain that was struck between the parties on the ground that it is commercially difficult for one party to perform the same.

77. The decision of the Arbitral Tribunal to award the difference between the price quoted by the tenderers and the

price quoted by JRIL, is unsustainable. It amounts to re-writing the contract between the parties. The impugned award is in conflict with the fundamental policy of Indian law and is vitiated by patent illegality."

68. Applying these principles, the impugned arbitral award, by altering the agreed preconditions under the PEM, LoA and GCC and substituting a new contractual regime, violates the fundamental policy of Indian law and the principles of natural justice, and falls within the narrow exceptions permitting interference under Section 34 of the Act.

C. Award of Rs. 13,65,000/- and No Evidentiary Basis

69. The learned arbitrator awarded Rs. 13,65,000/- towards the cost of preparation of 65 drawings, including the cost of draftsman, printing and preparation charges. The finding of the learned arbitrator is as under:

"100. I find that the claimant has considered it to be an opportunity to claim a huge amount from the respondent. However, all the same, it (the claimant) is entitled to claim the amount under clause (C). It is Rs. 13,65,000/(Rupees Thirteen Lakhs Sixty Five Thousand Only) being the cost of preparation of 65 drawings. It is a fact that the 65 drawings submitted by the claimant were neither returned nor rejected. The claimant is justified to claim this particular amount."

70. The petitioner contends that the same is unsupported by evidence and that it is simply the sum total of employee salaries for a certain period, on the assumption that the employees were exclusively engaged on this project. Further, the claim of the respondent was premised on the

submission of 65 drawings, however, only 18 were approved and the rest required significant revisions.

71. The PEM expressly linked the procurement of material by the respondent based on the approved and utilised drawings by the petitioner. By awarding costs for all 65 drawings without proof of their approval, utilisation or benefit to the petitioner, the learned arbitrator acted on conjectures rather than evidence. Clause 8 of the PEM reads as under:

> *"8. Material Procurement:*
>
> *Xiamen Longking Bulk Materials Science and Engineering Co. Ltd. starts with the procurement of material based on the tender requirements and as soon as drawings and data sheets are approved by customer the procurement position is re checked for compliance with approved documents. The dispatch shall be scheduled in stages to assure availability of the requisite materials based on the mile stones."*

72. Significantly, the learned arbitrator himself recorded that an aggregated salary data, without proof of exclusive engagement on the project, was unreasonable. The relevant paragraph of the impugned arbitral award reads as under:

> *"96. I have carefully gone through pages 223 to 467 of Volume-II. It appears that the claimant treated it to be an opportunity to claim everything from the respondent. It is claiming the salaries of its four employees for seven months and seven employees for five months. This is evident from Pages 223 to 330 of Volume-H. The copyright fee for the drawings is shown in Ex.CW-1/37. The travelling expenses are shown in Ex. CW-1/38. The salary of Sh. Anmol, CW-1, from*

July 2015 to June 2017 has been claimed vide Pages 441 to 467 of Volume-H. The claimant wants this tribunal to accept its claim that all these employees did not do anything for these several months except the project assigned to them through the LOAs."

73. On perusal, it is expressly noted that the respondent expected the learned arbitrator to accept, without corroboration, that the employees worked solely on this project for the claimed periods, remarking under paragraph 97 of the impugned arbitral award, that "*one has to be fair while claiming the amount*" and "*there has to be justification for each and every claim*".

74. Despite rejecting other such claims for lack of exclusive project engagement, the learned arbitrator, in contradiction to his own reasoning, allowed the entire claimed amount of Rs. 13,65,000/- towards 65 drawings. The record indicates that this figure too was derived from salary payslips for a five to seven months period, without any evidence of approval or use of the drawings by the petitioner, nor any demonstrated value derived therefrom.

75. Further, no reasoning or calculation method was provided by the learned arbitrator behind allowing the whole claimed amount of Rs. 13,65,000/- to cover the design and engineering cost of all the 65 drawings.

76. In ***Satluj Jal Vidyut Nigam Ltd. v. Jaiprakash Hyundai Consortium & Ors., 2023 SCC OnLine Del 4039***, this Court underscored the need for caution in entertaining financial claims without proper evidentiary basis. The relevant paragraph reads as under:

"57. Entertaining financial claims based on novel mathematical derivations, without proper foundation in the

pleadings and/or without any cogent evidence in support thereof can cause great prejudice to the opposite party. Especially in the context of construction contracts where amounts involved are usually astronomical, any laxity in evidentiary standards and absence of adequate diligence on the part of an arbitral tribunal in closely scrutinizing financial claims advanced on the basis of mathematical derivations or adoption of novel formula, would cast serious aspersions on the arbitral process. The present case is an example where substantial liability has sought to be fastened on one of the contracting parties based on specious paper calculations. It cannot be overemphasized that arbitral tribunals must exercise due care and caution while dealing with such claims."

77. Hence, in the present case, the award of Rs. 13,65,000/- is not the outcome of a reasoned evaluation based on cogent evidence but is instead a conclusion based on guesswork and not supported by any evidence. Thus, it is in conflict with the most basic notions of justice.

78. In view of the findings above, the challenge by the petitioner to the award of Rs. 13,65,000/- along with interest @ 6% per annum with effect from 01.01.2019 till realisation, is upheld.

CONCLUSION

79. Consequently, the present petition under Section 34 of the Act is allowed and the Arbitral Award dated 03.07.2020 passed by the learned arbitrator in the arbitration matter titled as "*Xiamen Longking Bulk Material Science & Engg. Co. Ltd. v. Bharat Heavy Electricals Limited (BHEL)*", is hereby set aside, being in conflict with the fundamental

policy of Indian law as well as the fundamental principles of natural justice under Section 34(2)(b)(ii) of the Act.

80. The amount deposited by the petitioner with the Registrar General, Delhi High Court, *vide* the Order dated 09.11.2020 passed by this Court in I.A. 10230/2020, shall be released to the petitioner along with the up-to-date accrued interest, within 4 weeks from today.

81. Accordingly, the petition is allowed.

JASMEET SINGH, J

AUGUST 21, 2025 / *shanvi*

Click here to check corrigendum, if any