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

% *Judgment delivered on:* 23.05.2022

\+ **O.M.P. (COMM) 227/2019**

**UNION OF INDIA, MINISTRY OF RAILWAYS, RAILWAY BOARD & ANR.** ..... Petitioner

versus

**M/S JINDAL RAIL INFRASTRUCTURE LIMITED** ..... Respondent

**Advocates who appeared in this case:**

For the Petitioners : Mr Deepak Jain, Senior Panel Counsel for Ministry of Railways with Mr K.B. Pradeep, Ms Jaspreet Aulakh and Mr Tanpreet Gulati, Advocates.

For the Respondent : Mr Ranjit Kumar, Senior Advocate with Mr Manoj Singh, Mr Nilava Bandyopadhyay, Mr Prateek Dhir and Mr Nimish Chandra, Advocates.

**CORAM**
**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the '**A&C Act**') impugning the arbitral award dated 01.03.2019 (hereafter the

**'impugned award'**) rendered by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter the **'Arbitral Tribunal'**).

2. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with an agreement dated 12.06.2015 entered into between petitioner no.1 (hereafter '**the Railways'**) and the respondent (hereafter '**JRIL**').

**Factual Background**

3. JRIL is, *inter alia*, engaged in the manufacture of Railway Rolling Stock for the Indian Railways.

4. On 13.01.2015, the Railways issued a 'Bid Invitation and Schedule of Requirement' [E-Tender bearing no 2014/RS(I)/954/36 (TC)] followed by the Corrigendum dated 25.03.2015, inviting electronic bids, for the manufacture and supply of the following wagons: -

| S.no | Description | Quantity specified in Tender dated 13.01.2015 | Quantity specified in Corrigendum dated 25.03.2015 |
|---|---|---|---|
| 1 | BG Bogie Open Wagon Type 'BOXNHL' | 4392 | 7492 |
| 2 | BG Bogie Covered Wagon Type 'BCNHL' | 3706 | 606 |
| 3 | BG Bogie Open Wagon Type 'BOSTHSM2' | 211 | 211 |

| | | | |
|---|---|---|---|
| 4 | BG Bogie Hopper Wagon Type 'BOBYN 22.9' | 200 | 200 |
| Total | | 8509 | 8509 |

5. Clause 2 of the Bid Invitation and Schedule of Requirement stipulated that the aforementioned quantity was tentative, and the Railways reserved its right, without assigning any reason, to either decrease the tender quantity or discharge the tender entirely or not order some of the wagon types indicated in the tender quantity.

6. Pursuant to the said invitation for tenders, JRIL submitted its bid and the same was opened on 20.04.2015. JRIL was accepted as the lowest bidder (L-1 bidder). On 02.06.2015, the Railways issued the Letter of Acceptance (hereafter 'the **LoA**') communicating its decision to place an order on JRIL for supply of the following wagons at the price as quoted by JRIL:-

| Wagon Type | Quantity | Basic Rate per wagon |
|---|---|---|
| BOXNHL | 1654 | ₹10,80,000/- |
| BCNHL | 106 | ₹10,71,000/- |
| BOSTHSM2 | 111 | ₹8,91,000/- |
| TOTAL | 1871 | |

In terms of the LoA, the orders for supply of wagons would be released in two tranches.

7. Thereafter, on 12.06.2015, the parties entered into the Contract bearing no. 2015/RS(I)/954/44/1777 (hereinafter the '**Agreement**'). In

terms of the Agreement, the Railways issued an order for manufacture and supply of 1403 numbers of wagons for a total contract price of ₹151,52,40,000/- without excise duty and VAT, as the first tranche. The order for the balance 468 numbers of wagons was withheld and required to be released in the second tranche.

8. In terms of the Optional Clause under the Agreement (Clause 2.4 renumbered as Clause 2.8 of the Agreement), the Railways reserved the right to increase/decrease the ordered quantity up to 30% of the ordered quantity during the currency of the Agreement, on the same price and terms and conditions, with a suitable extension in the delivery period for the optional quantity. Further, in terms of Clause 6 of the Agreement (the Delivery Schedule), the supplies had to be completed within a period of twelve months from the date of placement of the Agreement. The said Agreement was accepted by JRIL on 18.06.2015.

9. The Agreement was amended several times. On 31.07.2015, Amendment no. I to the Agreement was issued by the Railways. In terms of Amendment no. I, certain clauses were incorporated in the Agreement. Clause 2.4 of the Agreement, which provided that the Railways could increase/decrease the quantity upto 30%, was renumbered as Clause 2.8 of the Agreement. Clause 2.4 of the Agreement, as introduced, stipulated that the "*withheld quantity of 468 wagons shall be released in proportion to your supply performance during the period of six months from the date of issue of this contract, i.e., June- November, 2015 by multiplying percentage compliance with*

*the withheld quantity. The remaining quantity shall be taken away for re-distribution amongst performing units, having more than 100% compliance*."

10. On 28.08.2015, the Railways awarded a contract (bearing no. 2015/RS(I)/954/46/1779) for the supply of 1075 numbers of wagons (975 numbers of 'BOXHNL' wagons and 100 numbers of 'BOSTHSM2' wagons) to the L-2 tenderer (M/s Jupiter Wagons Limited) at the rates quoted by the said tenderer, that is, L-2 rates for BOXHNL wagons, and at L-1 rates for BOSTHSM2 wagons. This was because the said bidder as well as other bidders had declined the counter-offer made by the Railways to supply BOXHNL wagons at the L-1 rate (₹10,80,000/- as quoted by JRIL).

11. JRIL, being aggrieved by dual pricing of the BOXHNL wagons, made a representation dated 28.11.2015 voicing its grievance that the Notice Inviting Tender did not indicate that there would be two rates applicable for supply of wagons by different bidders. JRIL sought "*parity of treatment with the other contractor so that for and the same work, a uniform fixation may prevail and the contract amount does not differ for the same work between one contractor and another contractor*".

12. Thereafter, on 14.03.2016, Amendment no. II to the Agreement was issued by the Railways. In terms of Amendment no. II, the order for 329 numbers of wagons (251 numbers of BOXNHL and 78 numbers of BOSTHSM2), out of the withheld quantity of 468

numbers of wagons, was released. Further, it was decided that the balance number of wagons, that are, 139 in number, would not be released, in favour of JRIL. The delivery period for the second tranche was stipulated to be the same as the contractual delivery period, that is, 11.06.2016. The total value of the Agreement was thus, amended to ₹185,58,18,000/-. JRIL conveyed its unconditional acceptance to the said amendment on 16.03.2016.

13. On 08.04.2016, Amendment no. III to the Agreement was issued by the Railways. In terms of Amendment no. III, the Railways exercised its right reserved under the Option Clause (initial Clause 2.4 renumbered as Clause 2.8 of the Agreement) and increased the ordered quantity of BOXNHL wagons by 496 numbers. The delivery period for the aforesaid quantity was increased by five months from the existing delivery period, that is, 11.06.2016. The total value of the Agreement was thus, amended to ₹239,14,98,000/-. JRIL conveyed its unconditional acceptance to the said amendment on 18.04.2016.

14. In the meantime, on 12.01.2016, another tender was floated by the Railways [E:Tender No. 2015RS(I)17TC], which was opened and the lowest price for the BOXNHL wagon bid by the tenderers was ₹14,50,000/- per wagon. JRIL was awarded the contract for supply and manufacture of 292 numbers of BOXNHL wagons at the rate of ₹14,50,000/- per wagon. The total contract price was ₹42,34,00,000/-.

15. JRIL preferred another representation dated 30.05.2016 and requested the Railways to revise the payment due to it at the L-2 rates.

16. On the same day, that is, on 30.05.2016, JRIL sent a letter stating that it would not be able to complete the manufacture and supply of the required 1654 numbers of BOXNHL wagons within the scheduled delivery period of 11.06.2016, on account of unavailability of free supply of steel in matching sets. JRIL requested that the delivery period be extended without levy of liquidated damages and denial clause.

17. On 09.06.2016, Amendment no. IV to the Agreement was issued by the Railways extending the delivery period by a period of four months beyond 11.06.2016, for the manufacture and supply of the balance 588 numbers of BOXNHL wagons out of the original contract quantity of 1654 numbers of BOXNHL wagons. However, the same was extended with liquidated damages and denial clauses.

18. By its letter dated 11.06.2016, JRIL once again requested the Railways for extension of delivery period without imposition of liquidated damages and denial clauses as the delay in manufacture and supply of BOXHNL wagons was caused due to non-availability of free supply of steel in matching sets. JRIL requested the Railways to (i) issue an amendment to Amendment no. IV to extend the delivery period for 290 numbers of BOXHNL wagons under the first tranche order of 1403 numbers of wagons without liquidated damages and denial clause and; (ii) issue an amendment to Amendment no. II and Amendment no. IV to refix the delivery date for 251 numbers of BOXHNL wagons.

19. The Railways accepted the said request and issued Amendment no. V to the Agreement. In terms of Amendment no. V, the Railways extended the delivery period of the balance first tranche quantity of 290 numbers of BOXNHL wagons out of 1403 numbers of wagons without liquidated damages and denial clauses upto 11.10.2016; and refixed the delivery period of 251 numbers of BOXNHL wagons released under the second tranche upto 11.10.2016. Amendment no. V superseded Amendment no. IV.

20. JRIL invoked the Arbitration Agreement by its letter dated 23.08.2016 to adjudicate its claims including in regard to dual pricing of wagons. The Railways responded to the aforesaid communication on 20.09.2016 and nominated an Executive Director, Railway Stores (C) of the Railway Board as the sole arbitrator. However, JRIL did not concur with the said appointment.

21. Thereafter, JRIL filed a petition under Section 11 of the A&C Act (being ARB. P. 613/2016) for the appointment of an arbitrator. The said petition was allowed and by an order dated 04.11.2016, this Court appointed Justice (Retd.) A.K. Patnaik, former Judge of the Supreme Court as the Sole Arbitrator to adjudicate the disputes between the parties.

22. On 25.11.2016, Amendment no. VI to the Agreement was issued by the Railways. The delivery period for the manufacture and supply of balance 396 numbers of BOXNHL wagons against the Option Clause under the Agreement was extended for a period of three

months, that is, till 09.02.2017 without liquidated damages but with denial clauses.

23. On 03.12.2016, JRIL conveyed its unconditional acceptance to Amendment no. VI.

24. On 18.01.2017, JRIL filed its Statement of Claims before the Arbitral Tribunal raising six claims. The summary of the claims as noted by the Arbitral Tribunal in the impugned award, is set out below:

> "3.1.17. On the aforesaid facts as pleaded in the Statement of Claim, the Claimant has prayed for the following reliefs:
>
> (i) An Award declaring that the total quantity of the wagons has been short closed by the Respondents and the Claimant's obligation under the Contract pursuant to the Tender relating to BOXNHL Wagons discharges on execution of 796 (612 wagons and 30% Option Clause) BOXNHL Wagons;
>
> (ii) An Award declaring that due to the breaches committed by the Respondents by adopting dual pricing, the Claimant is entitled to the L2 rate for the entire quantity awarded to the Claimant;
>
> (iii) An Award directing the Respondents to pay a sum of INR. 52,47,21,679 (Rupees Fifty-Two Crores Forty-Seven Lakhs Twenty-One Thousand Six Hundred and Seventy-Nine Only) [Alternatively 32,12,37,351/- (Rupees Thirty-Two Crores Twelve Lakhs Thirty-Seven Thousand Three Hundred and Fifty-One Only)] [Further Alternatively INR 51,82,91,768/- (Rupees Fifty-One Crores Eighty-Two Lakhs Ninety-One Thousand Seven

Hundred and Sixty-Eight Only)] as tabled in the Summary of Claims;

(iv) Pass an Award that the Claimant is entitled to the Litigation Cost as claimed in the present Arbitration proceedings and also as per the Arbitration and Conciliation Act, 1996 (as amended up-to-date);

(v) Pass an Award that the Claimant is entitled to interest @ 18% quarterly rest for the pendente-lite period and future interest@ 2% higher than that the current rate of interest prevalent on the date of award, as per the Arbitration and Conciliation Act, 1996 (as amended up-to-date); and

(vi) Pass any other or further award as this Hon'ble Tribunal deems fit, just and proper in the facts and circumstances of the case"

25. The Railways contested the aforesaid claims and filed its Statement of Defence. On 22.03.2017, the Railways filed an application under Section 16 of the A&C Act before the Arbitral Tribunal contending that the disputes and claims raised by JRIL were not arbitrable and therefore, they were liable to be dismissed *in limine*.

26. In view of the rival contentions, the Arbitral Tribunal framed the following points of adjudication on 22.03.2017:

"4. POINTS OF DISPUTE

In the proceedings of the arbitral meeting dated 22.03.2017, the arbitral Tribunal after perusing the pleadings and after hearing the advocates for the parties, formulated the following points of dispute for adjudication in this arbitration matter:

(i) Whether all or any of the Claims raised by the Claimant in the Statement of Claim are outside the scope of the contract between the parties and hence not arbitrable?

(ii) Whether all or any of the reliefs no. (i), (ii), (iii) claimed by the Claimant in the Statement of the Claim can be granted?

(iii) Whether the Claimant is entitled to interest on the amount awarded and if so, at what rate and for which period.?

(iv) Which party is entitled to the costs of the arbitration and what would be the reasonable costs which should be awarded?"

***The Impugned Award***

*Points of Dispute nos. (i) and (ii)*

27. The Arbitral Tribunal held that Claim no. (i) was beyond the jurisdiction of the Arbitral Tribunal as it could not declare that JRIL's obligation under the Agreement, pursuant to the tender relating to the BOXNHL wagons, was discharged on execution of 796 numbers of BOXHNL wagons.

28. In respect to Claim nos. (ii) and (iii), the Arbitral Tribunal held that even if the 'Bid Invitation and the Instructions to Tenderers' was treated as a part of the Agreement between the parties, there was no stipulation that in the event the purchase orders are placed at L-2 rates with any party, the L-1 bidder (that is, JRIL) would be entitled to L-2 rates. The Arbitral Tribunal also referred to Section 73 of the Indian Contracts Act, 1872 and held that in the absence of any breach of any

provision of the Agreement providing that the Railways shall pay L-2 rates for the wagons to JRIL, the Arbitral Tribunal could not award compensation computed as the difference between the L-1 and L-2 rates to JRIL for the wagons to be supplied to the Railways at L-1 rates. The Arbitral Tribunal had no jurisdiction to entertain the aforesaid claims of JRIL for being paid L-2 rates for 1654 numbers of BOXHNL wagons supplied by JRIL to the Railways.

29. The Arbitral Tribunal rejected Claim no. (iii) and the two claims amounting to ₹30,39,69,420/- (being the differential amount between L-1 and L-2 rate) and ₹1,02,23,273/- (being the interest accrued on the differential amount) preferred by JRIL, as JRIL was not entitled to the L-2 rate for the entire quantity of BOXNHL wagons. The Arbitral Tribunal held that the same was outside the scope of the Agreement. The claims for an amount of ₹50,07,93,557/- and ₹1,68,83,464/- was also rejected by the Arbitral Tribunal on the ground of jurisdiction.

30. However, the Arbitral Tribunal held that the Railways had no right to issue Amendment no. III – even though the same was accepted by JRIL – and was in breach of the provisions of the Agreement. The Arbitral Tribunal held that the costs of manufacture of wagons and market price for supply of wagons had gone up substantially and, the Railways could not have ordered additional quantity of 496 numbers of wagons at the contract price of ₹10,80,000/-, either under Clause 2.4 or Clause 12 of the Agreement.

31. The Arbitral Tribunal also held that the Railways could not have exercised its right reserved under Clause 2.4 or Clause 12 of the Agreement in the facts of the present case, when the price of the BOXNHL wagons was lower than the costs for manufacture of the wagons and the revised rate of BOXHNL wagons was found to be ₹14,50,000/- in the bids opened on 12.01.2016. The Arbitral Tribunal further accepted JRIL's contention that it had given unconditional acceptance to Amendment no. III to ensure that the Railways did not encash the Bank Guarantees furnished by it and it does not get blacklisted.

32. Further, the Arbitral Tribunal referred to Sections 70 and 73 of the Indian Contracts Act, 1872 and held that the Railways was liable to compensate JRIL for the loss and damage caused to it on account of 496 numbers of wagons supplied at the rate of ₹10,80,000/-. Accordingly, the Arbitral Tribunal awarded a sum of ₹18,35,20,000/-, being the difference in the value of 496 numbers of wagons at the contract price and market price.

*Point of dispute no. (iii)*

33. The Arbitral Tribunal directed the Railways to pay the awarded amount of ₹18,35,20,000/- within a period of three months from the date of the award, failing which, the Railways was liable to pay post award simple interest at the rate of 12 % per annum from the date of the award till the date of payment.

*Point of Dispute no. (v)*

34. The Arbitral Tribunal did not award costs in favour of JRIL and directed that the parties would bear their own costs.

35. The operative part of the impugned award reads as under:-

> "(a) The Respondents will pay to the Claimant a sum of INR 18,35,20,000 (Rupees Eighteen Crores Thirty-Five Lakhs Twenty Thousand only) as damages or compensation under Sections 70 and 73 of the Indian Contract Act, 1872.
>
> (b) The Claimant is not entitled to any pre-award interest under Section 31(7)(a) of the Arbitration and Conciliation Act, 1996.
>
> (c) The Respondents will pay the awarded sum of INR 18,35,20,000 within 3 (Three) months from the date of the award, failing which, the awarded amount of INR 18,35,20,000 will carry post award simple interest at the rate of 12% per annum from the date of the award the date of payment under Section 31 (7) (b) of the Arbitration and Conciliation Act, 1996.
>
> (d) The parties shall bear their own costs.
>
> (e) All other Claims of the Claimant are rejected."

36. Aggrieved by the impugned award, the petitioners have filed the present petition.

**Submissions**

37. Mr Jain, learned counsel appearing for the Railways, has assailed the impugned award on the ground that it amounts to re-

writing the contract between the parties. He submitted that the Arbitral Tribunal rejected the other claims of JRIL but awarded a sum of ₹18,35,20,000/- in favour of JRIL, being the price of 496 numbers of wagons calculated at the price quoted by the tenderers pursuant to the issuance of the invitation to tender. He contends that the same is manifestly erroneous as JRIL had supplied 496 numbers of wagons in terms of the contract between the parties and therefore, was not entitled to any amount in excess of the price, as agreed between the parties. The Arbitral Tribunal had proceeded on the basis that it was not permissible for the Railways to place an order for wagons at the agreed price, which was below the market price. According to the Arbitral Tribunal, the Agreement between the parties was required to be construed in a workable manner and it was not open for the Railways to place an order after it had discovered a higher market price. According to the Railways, this amounts to re-writing the Agreement and the same is impermissible.

38. Further, Mr Jain contended that there was no dispute that the Railways was entitled to increase the agreed quantity of wagons up to 30%. JRIL had not raised any dispute in this regard. JRIL had disputed the allocation of the quantities. According to JRIL, the quantity of wagons allocated was in excess of the quantities as stipulated under the tender conditions. The Arbitral Tribunal had rejected the said contention. Thus, the impugned award is beyond the claims made by JRIL.

39. Mr Ranjit Kumar, learned senior counsel appearing for JRIL, countered the aforesaid submissions. He submitted that exercise of the Option Clause by the Railways was in dispute before the Arbitral Tribunal. The Arbitral Tribunal found that the same was in breach of the terms of the Agreement between the parties. He submitted that the Railways had exercised its option to place an order for additional quantities of wagons on JRIL as the prices tendered by various tenderers were substantially high. He contended that the additional quantity of wagons ordered was relating to the subsequent year's requirement and therefore, the Railways was not entitled to insist on supply of any additional quantity. He submitted that the Arbitral Tribunal had interpreted the contract between the parties in a reasonable manner. The Arbitral Tribunal is the final adjudicator regarding interpretation of the contract and therefore, no interference was warranted with the impugned award. He submitted that the impugned award was neither in contravention of the fundamental policy of Indian Law nor could be held to be vitiated by patent illegality.

40. He also referred to the decisions of the Supreme Court in ***Ssangyong Engineering & Construction Company Limited v. NHAI: (2019) 15 SCC 131***; ***Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited: (2022) 1 SCC 131***; ***PSA Sical Terminals Private Limited v. Board of Trustees of VO Chidambranar Port Trust Tuticorin and Ors.: (2021) SCC OnLine SC 508***; ***Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.:***

***(2019) 20 SCC 1***; and, ***MSK Projects India (JV) Ltd. v. State of Rajasthan & Anr.: (2011) 10 SCC 573***, in support of his contentions.

**Reasons and Conclusion**

41. As is apparent from the above, the limited controversy that falls for consideration before this Court is whether the Railways was entitled to exercise the Option Clause (Clause 2.8 of the Agreement) to increase the ordered quantity up to 30% to be supplied at the agreed price. The Arbitral Tribunal faulted the Railways for placing orders of additional quantities of 496 numbers of BOXHNL wagons at the agreed contract price of ₹10,80,000/-. The Arbitral Tribunal reasoned that the terms of the Agreement were determined by the Railways and JRIL had no option but to accept the same. In such circumstances, the terms of the contract could not be literally interpreted, if it "*flouts business common sense*". The Arbitral Tribunal held that the parties could not have intended for the Railways to exercise an option of increasing the quantity if the price in the market or the cost of production had increased substantially, rendering it commercially unviable to manufacture and supply the said wagons.

42. Although, JRIL had unconditionally accepted Amendment no. III dated 08.04.2016 and agreed to supply additional quantity of wagons, the Arbitral Tribunal held that it was impermissible for the Railways to have issued Amendment no. III, as it was in breach of the provisions of the Agreement.

43. The question whether the said findings of the Arbitral Tribunal are manifestly erroneous and vitiates the impugned award on the ground of patent illegality must be considered in the context of the Agreement as well as the claims raised by JRIL.

44. The Railways had invited tenders for supply of 8509 numbers of wagons, which included 7492 numbers of BOXNHL type wise wagons. The controversy in the present case relates to the BOXNHL wagons.

45. Clause 2.1 of the Instructions to Tenderers for E-Tender (Tender No.2014/RS(I)/954/369TC), provided that "*55% of the total quantity shall be distributed amongst eligible regular wagon manufacturers on the basis of respective average annual production of previous five completed years as 2010-11, 2011-12, 2012-13, 2013-14 & 2014-15*" (Performance Index). In terms of Clause 2.4 of the Instructions to Tenderers for E-Tender, *the remaining 45% quantity would be distributed wagon type-wise amongst L-1, L-2 and L-3 tenderers in the ratio of 50:30:20*.

46. JRIL was a new entrant into the business of wagon manufacturing and it was not entitled to any significant quantity under the Performance Index quota. According to the Railways, JRIL was entitled to an order of approximately 96 numbers of wagons. JRIL participated in the tender and quoted a price substantially lower than other bidders. It was, accordingly, declared as the L-1 tenderer. JRIL was thus, entitled to 50% of the 45% of the total quantities for which

the tenders were invited. Accordingly, 1871 numbers of wagons were allocated to JRIL. According to the Railways, JRIL was entitled to 96 numbers of wagons on the basis of its Performance Index quota under Clause 2.1 of the Instructions to Tenderers for E-Tender (out of the 55% reserved for regular wagon manufacturers). However, JRIL's annual capacity of manufacturing wagons was assessed as 1400 units and therefore, it was allocated only 1871 numbers of wagons, which included 1654 numbers of wagons of BOXNHL type.

47. The LoA issued by the Railways communicated its decision to place the orders for the following wagons at the quoted price, on JRIL:

| Wagon type | Quantity | Basic Rate per wagon (₹) |
|---|---|---|
| BOXNHL | 1,654 | 10,80,000.00 (₹ ten lakh eighty thousand only) |
| BCNHL | 106 | 10,71,000.00 (₹ ten lakh seventy one thousand only) |
| BOSTHSM2 | 111 | 8,91,000.00 (₹ eight lakh ninety one thousand only) |
| TOTAL | 1,871 | |

48. The LoA also expressly provided that the order for 1,403 numbers of BOXNHL wagons would be released shortly. The remaining quantities would be withheld and released at the end of six months from the date of the Agreement provided that JRIL had

supplied 50% of the quantity consisting of the outstanding order as on 01.06.2015, that is, 936 numbers of wagons.

49. It is important to note that in terms of paragraph 9 of the LOA, the Railways retained the right to increase or decrease the ordered quantity up to 30% during the currency of the Agreement. Paragraph 9 of the LoA is relevant and set out below:

> "9. Option Clause: The purchaser reserves the right to increase/decrease the ordered quantity up to 30% of the ordered quantity during the currency of the contract on the same price and terms and conditions with suitable extension in delivery period for the optional quantity."

50. As stated above, the order for 468 numbers of wagons was withheld. It was agreed that the said quantity would be released in proportion to JRIL's performance during the period of six months, that is, June – November, 2015. The Agreement between the parties was amended to provide the same (Amendment no. I dated 31.07.2015).

51. However, out of the said quantities, order for only 329 numbers of wagons was released. Thus, in all, orders for 1732 numbers of wagons were placed on JRIL. On 08.04.2016, the Railways placed an order for additional 496 numbers of BOXNHL wagons by exercising its option to place orders for additional quantities up to 30%. Thus, orders for 2228 numbers of wagons were placed on JRIL, which includes 2150 numbers of BOXNHL wagons (1654 numbers of wagons as initially contracted and 496 numbers of additional wagons).

52. Indisputably, the Railways was entitled to increase the ordered quantity of wagons up to 30%. This was expressly stipulated in paragraph 9 of the LoA and Clause 2.4 of the Agreement (subsequently renumbered as Clause 2.8 of the Agreement by Amendment no. I). The said Clause 2.4 of the Agreement is reproduced below:

> "2.4. Option Clause: The purchaser reserves the right to increase/decrease the ordered quantity up to 30% of the ordered quantity during the currency of the contract on the same price and terms and conditions with suitable extension in delivery period for the optional quantity."

53. As noted above, the Agreement was amended on several occasions. The first amendment (Amendment no. I dated 31.07.2015) renumbered the said Clause 2.4 as Clause 2.8 of the Agreement as four other clauses were inserted after Clause 2.2 of the Agreement.

54. A plain reading of the Statement of Claims indicates that JRIL had not challenged the validity of Clause 2.4 of the Agreement (renumbered as Clause 2.8 of the Agreement). JRIL's principal claims related to (i) the number of wagons allocated to it considering that the Railways did not place orders for the entire tendered quantity on various manufacturers; and, (ii) the action of the Railways in adopting dual pricing.

55. JRIL had claimed that in terms of the Instructions to Tenderers for E-Tender, its rightful allocation was only 612 numbers of BOXNHL wagons. According to JRIL, since an order for only 3040

numbers of wagons was placed by the Railways, only 45% of that quantity was required to be allocated on the basis of competitive bidding (1368 numbers of wagons being 45% of 3040). JRIL, being the L-1 tenderer, was entitled to 50% of the said quantity of 1368 numbers of wagons. According to JRIL, 1368 numbers of wagons would include 1223 numbers of wagons of BOXNHL type and therefore, its share of the said allocation was 612 numbers of BOXNHL wagons.

56. It is important to note that JRIL accepted that the Railways was entitled to increase the said quantity by 30% in terms of Clause 2.8 of the Agreement (initially numbered as Clause 2.4 of the Agreement) and accordingly, claimed that its obligation to supply wagons was discharged with the supply of 796 numbers of wagons (612 plus 30% additional, in terms of the Optional Clause). This is clear from Paragraphs I and J of the Statement of Claims, which are set out below: -

> "I. Therefore, as the total quantity of BOXNHL wagons has been decreased to 2718 BOXNHL wagons, as per the formula provided in the Instructions to Tenderers for e-Tender (which formed integral part of the Contract Agreement), the Claimant is bound to manufacture and supply only 612 BOXNHL wagons. Furthermore, even if the Respondents exercise the 30% Option Clause of the Contract Agreement, then also the same increase the quantity by 184 BOXNHL wagons only, accordingly, as per the terms of the Contract Agreement dated 12th June 2015, the Claimant is bound to execute only 796 BOXNHL

Wagons. Chart pertaining to the quantities has been annexed hereto and marked as **Annexure-CD-15**.

J. In view of the above, it is humbly submitted that the Hon'ble Arbitral Tribunal may graciously be pleased to pass an Award inter alia declaring that the Respondents have short closed the total quantity of the BOXNHL wagons and accordingly, the Claimant's obligation under the Contract Agreement relating to BOXNHL wagons fulfils or discharges on manufacture and supply of 796 (612+184) BOXNHL wagons."

57. It is relevant to note that JRIL's calculation of the quantity of wagons that it was obliged to supply rested on its assertion that the Railways had short closed the tender by reducing the total quantity of wagons to be procured under the said tender (Tender no. 2014/RS(I)/954/369TC). On the aforesaid assertion, JRIL had claimed an additional amount as damages for the excess quantity supplied by it. It claimed that it was entitled to the market value of the said quantity or at least, the difference between the rates quoted by it (L-1 rates) and the rates quoted by second lowest tenderer (L-2).

58. JRIL also claimed that it was impermissible for the Railways to procure wagons under the same Notice Inviting Tenders, at dual pricing. Since the other bidders had declined to accept the counter offer of the Railways to supply at L-1 rates (prices quoted by JRIL), it had placed orders on other bidders at the rates quoted by the second lowest tenderer (L-2).

59. It is, thus, clear that JRIL had not contested the right of the Railways to increase the quantity up to 30%. On the contrary, JRIL had accepted the same and framed its claim on the said basis.

60. As noted above, JRIL had also premised it claim on dual pricing. JRIL claimed that since the Railways had breached the terms of the Agreement by adopting dual pricing, therefore, JRIL was entitled to the market value of the wagons supplied and/or price at which the orders were placed on the other bidders (L-2 rate of ₹13,05,000/-). Paragraphs U, V, W, X, Y and Z of the Statement of Claims, which clearly indicates the basis of JRIL's claim in this regard, are relevant and set out below:

> "U. In the present case, at the time of committing breach of the terms of the Contract Agreement dated 12th June 2015 by adopting dual pricing, the Respondents were aware that the same will cause loss and damages to the Claimant.
>
> V. As stated above, the Claimant's contractual obligation to supply BOXNHL wagons discharges when the Claimant supplied 796 BOXNHL wagons. It is humbly submitted that the Claimant has supplied 796 BOXNHL wagons on 26th March 2016. Thereafter, till 31st December 2016 the Claimant has supplied 1898 BOXNHL wagons. During January 2017, 45 wagons have been supplied till 16th January 2017 and furthermore, as per the orders placed by the Respondents, the Claimant need to supply another 207 BOXNHL wagons. The chart pertaining to the quantities has been annexed hereto and marked as **Annexure-CD-18**.

W. It is humbly submitted that in the next e-Tender, which was opened on 12th January 2016, the Respondent discovered the price for BOXNHL wagons as Rs.14,50,000/-(Rupees Fourteen Lakhs Fifty Thousand Only). It is humbly submitted that as the price was discovered during January 2016 April 2016, the market price of BOXNHL wagons in the month of March 2016 (the month on which the Claimant supplied its 796 BOXNHL wagons) ought to be treated as Rs.14,50,000/- (Rupees Fourteen Lakhs Fifty Thousand only). On the basis of the same, the Claimant for manufacturing and supply of the remaining 1354 BOXNHL wagons is entitled for compensation at the market rate, which is Rs.14,50,000/- and at the same time the rate has to be adjusted as per the Price Variation Clause mentioned in the Contract Agreement.

X. It is humbly submitted that as the Respondents have breached the terms and conditions of the Contract Agreement dated 12th June 2015, the Claimant is entitled to get compensation to the tune of **Rs.50,07,93,557/- (Rupees Fifty Crore Seven Lakhs Ninety Three Thousand Five Hundred Fifty Seven only)** based on the calculation annexed hereto as Annexure-CD-19.

Y. At the same time, alternatively, if the Hon'ble Tribunal comes to a finding that for the remaining portion of supply of BOXNHL wagons, i.e., 1354 BOXNHL wagons, the Claimant is entitled to the L2 rate (i.e., the rate awarded to M/s Jupiter), as the Respondents have breached the Contract Agreement by adopting dual pricing in the present Tender, then the Claimant is entitled to the L2 rate, which is Rs. 13,05,000/- (Rupees Thirteen Lakhs Five Thousand only) and at the same time the rate has to be adjusted as per the Price Variation Clause mentioned in the Contract Agreement.

> Z. It is humbly submitted that, alternatively, as the Respondents have breached the terms and conditions of the Contract Agreement dated 12th June 2015, the Claimant is entitled to get compensation to the tune of **Rs.30,39,69,420/- (Rupees Thirty Crore Thirty Nine Lakhs Sixty Nine Thousand Four Hundred Twenty only)** based on the calculation annexed hereto as **Annexure-CD-20**."

61. JRIL had not made any claim challenging the contractual provision, which entitled the Railways to increase the order of quantity by 30%.

62. The Arbitral Tribunal rejected JRIL's contention that the tenders invited were foreclosed by reduction of quantity. The Arbitral Tribunal also rejected JRIL's claim that the Railways had breached the terms of the Agreement or the tender conditions by adopting dual pricing. JRIL had supplied wagons at the price quoted by it and was not entitled to claim a higher price on the basis of the bids submitted by other tenderers. The said findings ought to have been dispositive of the claims raised by JRIL.

63. Notwithstanding that, the Arbitral Tribunal rejected the basis on which JRIL had raised its claim, and it entered an award of ₹18,35,20,000/-, in favour of JRIL.

64. JRIL had sought to escape the rigors of Clause 2.4 of the Agreement (renumbered as Clause 2.8 of the Agreement) by claiming that the said clause was only operative during the initial term of the Agreement. According to JRIL, the recourse to the Option Clause was

available only during the "*currency of the contract*". It is material to note that the Arbitral Tribunal did not accept this contention that the exercise of the Option Clause was beyond the currency of the Agreement.

65. As stated above, the said award is based on interpretation of Clause 2.4 of the Agreement (renumbered as Clause 2.8 of the Agreement), as according to the Arbitral Tribunal, the said clause did not entitle the Railways to place an order for additional quantities at the price quoted by tenderer, if there was a substantial increase in the market value or the cost of manufacturing of wagons. This was not a case set up by JRIL in its Statement of Claims.

66. This Court is of the view that the decision of the Arbitral Tribunal to seek to interpret Clause 2.4 of the Agreement (renumbered as Clause 2.8 of the Agreement), in a manner so as to curtail the right of the Railways to increase the quantity procured under the Agreement is, *ex facie*, erroneous. A plain reading of the said clause clearly indicates that the Railways was entitled to increase the quantity of the wagons during the currency of the Agreement by up to 30%. JRIL had voluntarily submitted its bid to supply BOXNHL wagons at a price of ₹10,80,000/-. The allocation of the quantities was made in conformity with the tender conditions. The Railways also had the right to alter the quantities by increasing or decreasing the same up to 30% during the currency of the Agreement. JRIL had agreed to provide additional quantities or to accept reduction in quantities without any change in the price quoted. Merely because the market value of the price of

wagons or its cost of production increased, the same cannot be a ground for reading the Agreement contrary to its plain terms.

67. JRIL had quoted a price that was substantially lower than the other bidders. The other bidders were not willing to supply the wagons at the price quoted by JRIL (L-1 price) and had declined the counter-offer made by the Railways. Thus, even at the tendering stage, JRIL had quoted a price, which was perhaps lower than the market value. According to the Railways, JRIL had bid aggressively and adopted predatory pricing.

68. 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 re-written the contract. This is, clearly, impermissible.

69. In ***PSA SICAL Terminals Pvt. Ltd v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others*** (*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."

70. 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.

71. 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.

72. According to the Arbitral Tribunal, the said clause is required to be re-interpreted contrary to its plain language as it "*flouts business common sense*". JRIL, in its commercial wisdom, had quoted a price of ₹10,80,000/- for supplying the BOXNHL wagons. It is not open for the Arbitral Tribunal to examine this commercial wisdom and re-write the Agreement on the basis of the commercial difficulties faced by JRIL in performing its obligations.

73. JRIL had bid a lower amount to garner a higher share of tendered quantity, which would entitle it to higher allocation of orders based on its Performance Index, in the next year. According to the Railways, JRIL had adopted predatory pricing to eliminate the other manufacturers from suppling the orders by making it commercially unviable to do so. The Arbitral Tribunal has not examined this contention while considering whether Clause 2.4 of the Agreement (renumbered as Clause 2.8 of the Agreement) "*flouts business common sense*".

74. 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.

75. 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.

76. 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.

77. In view of the above, the petition is allowed. The impugned award is set aside.

**VIBHU BAKHRU, J**

**MAY 23, 2022**
**RK**