

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 15th March, 2021

Pronounced on: 5th July, 2021

+ O.M.P. (COMM) 103/2021 & I.A. 3628/2021 (for ad-interim stay)

M/S INDIAN RAILWAY CATERING &
TOURISM CORPORATION (IRCTC) Ltd.

....Petitioner

Through: Mr. Nikhil Majithia, and Mr. Piyush
Gautam, Advocates.

versus

M/S DEEPAK & CO.

....Respondent

Through: Mr. Naresh Thanai and Ms.
Khushboo Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J.

1. IRCTC by way of the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter 'the Act'*], seeks the setting aside of the interim arbitral award dated 15th December, 2020 [*hereinafter 'Impugned Award'*], whereby, the learned Sole Arbitrator has allowed certain claims of the Respondent - Deepak & Co, the Claimant in the arbitration proceedings [*hereinafter referred to as 'DC' or the 'service provider'*].

BRIEF FACTS:

2. The events giving rise to the present petition are summarized as follows:

The Tender:

- 2.1. DC is a private railway catering service provider, empaneled with IRCTC and entitled to be considered for allotment of temporary licenses on Category 'A' trains. Catering services in railways, which were being provided in a composite mode, were unbundled with the introduction of Railway Budget for 2016-17 by creating a distinction primarily between food preparation and distribution. In furtherance of the said restructuring plan, on 07th September, 2016, IRCTC published a limited tender inviting bids from empaneled parties for providing on-board catering services in respect of Train No. 12951-52/12953-54 (Rajdhani/August Kranti Express) for six months. [hereinafter referred to as the '**tender document**'].
- 2.2. DC participated in the afore-said tender and emerged as the highest bidder. It was awarded a temporary license *vide* a Letter of Award dated 06th October, 2016. The Letter of Award mentioned the amounts payable by IRCTC to DC towards production charges as well as service charges for meals (breakfast, lunch, tea and dinner) served by DC in various A.C. classes on the train. Production charges, pertaining to the cost of actual production of the meal, were inclusive of tax; whereas service charges, for the cost of serving the meals, were exclusive of tax.

The Dispute:

- 2.3. Upon commencement of catering services from 19th December, 2016 till 04th March, 2017, the welcome drink served to the passengers was provided by IRCTC.
- 2.4. In the meantime, on 07th February, 2017, IRCTC took a policy decision as follows: (i) service provider to provide welcome drink to passengers at no extra-charge receivable by it, and if unwilling to do so, it could opt to exit the temporary license; (ii) where service provider was providing meals to passengers on account of short supply by IRCTC, it would be reimbursed production charges @ Rs. 84/- (inclusive of taxes) per passenger for lunch/dinner for 2nd and 3rd A.C. passengers; (iii) where additional meals were being served due to late running of train for more than 2 hours, service provider would be reimbursed @ Rs. 26.40 + service tax, per passenger.
- 2.5. The above policy decision was conveyed to DC *vide* letter dated 10th February, 2017. On the same date, DC responded by raising the following grievances/contentions: (i) DC reasoned that welcome drink was not included in the tender document; (ii) expressed reservation with regard to reimbursement of charges on account of late running of trains for more than 2 hours; (iii) emphasised that having made substantial investment in setting up a base kitchen and infrastructure, it was unwilling to exit from the contract.
- 2.6. On 13th February, 2017, DC wrote to IRCTC intimating that it would provide welcome drink to passengers in case the same was not done by IRCTC or the Indian Railways; but it would be charging for services as well as production charges for the same. Further, if the train was late, it would be entitled to charge Rs. 30/- plus service tax

for additional meal to be served to the passengers, as per decision of the Railway Board which formed part of the tender document.

- 2.7. On 22nd February, 2017, IRCTC instructed DC to immediately initiate the provision of welcome drink as per policy decision dated 07th February, 2017. This was followed by a reminder sent on 28th February, 2017. On 2nd March, 2017, DC, without prejudice to its rights as claimed in the letter dated 10th February, 2017, agreed to commence the service from 05th March, 2017.
- 2.8. On 06th April, 2017, IRCTC sought from DC an unconditional acceptance of the policy decision dated 07th February, 2017. DC was apprised that unless unconditional acceptance is tendered, it would be presumed that they are not interested in extension of the license and then suitable action would be taken by IRCTC. In response, DC gave its unconditional consent *vide* letter dated 12th April, 2017, and sought extension of the temporary license for a further period of six months.
- 2.9. IRCTC notified DC that since it had not provided welcome drink from 19th December 2016 to 04th March 2017, compelling IRCTC to provide the same, the charges incurred by IRCTC in respect thereof would be adjusted against the bills raised by DC upon IRCTC.
- 2.10. On 13th May, 2017, DC raised the issue of adjustment of welcome drink charges to its account, asserting that since it was asked to provide welcome drink only from 05th March, 2017 it was not liable for the charges of Rs. 6,97,500/-, for the period from 19th December 2016 to 04th March 2017. It further raised the issue of non-payment of service tax on service charge for food and drink for the above period, as well as other charges allegedly payable to it.

- 2.11. On 07th June, 2017, a six-month extension of license was granted to DC, as per policy decision dated 07th February, 2017. DC unconditionally accepted the same.
- 2.12. On 25th August, 2017, DC again raised the issue of reimbursement of welcome drink charges and other charges adjusted by IRCTC.
- 2.13. On 29th September, 2017, an Agreement was entered into by the parties, wherein DC expressly agreed that the terms and conditions of the licence would be governed by the – (i) Letter of Award dated 06th October, 2016, (ii) Letter of Acceptance dated 08th October, 2016, and (iii) Letter of Extension of License dated 07th June, 2017.
- 2.14. Subsequently, upon DC unconditionally accepting the terms and conditions of the temporary license, further extensions were granted from time to time, up to 06th July, 2018.

Arbitration:

- 2.15. In this backdrop, DC invoked arbitration by way of a letter dated 17th October, 2018 with regard to deductions made on account of welcome drink, as well as other issues.
- 2.16. Thereafter, on a petition filed under Section 11 of the Act, this court *vide* order dated 13th August, 2019, appointed Sh. P. S. Nerwal as the Sole Arbitrator to adjudicate the disputes between the parties.
- 2.17. DC, as the Claimant before the learned Sole Arbitrator, filed claims which were subsequently restricted to the following:
- I. Claim towards non-payment for welcome drink: DC contended that the welcome drink did not form part of the tender document. It should not be liable to serve the same or

reimburse the expenses incurred by IRCTC for serving the same from 19th December, 2016 to 04th March, 2017.

- II. Reimbursement of GST on production charges/supply of meals with effect from 1st July 2017.
- III. Claim towards wastage of food due to cancellation/non-turning-up of passengers.
- IV. Interest.

2.18. On 15th December, 2020, the Sole Arbitrator passed the Impugned Award allowing two claims of DC, viz. (i) payment with respect to welcome drink; and (ii) reimbursement of GST on production charges w.e.f. 01st July, 2017. He has held, *inter alia*, that since welcome drink did not form part of the tender document, IRCTC could not have made any deductions with respect to provisioning of said service. Further held that IRCTC is to reimburse the GST deposited by DC to the authorities, as the same was not included in the rates determined in Annexure-F of the tender document. The claim towards wastage of food, was rejected.

2.19. IRCTC filed an objection against the Impugned Award before the District Judge at Patiala House Court Complex, Delhi, however, the claim calculated by IRCTC exceeded its pecuniary jurisdiction as per the provision of Section 12(2) of the Commercial Courts Acts, 2015. Therefore, the application was withdrawn on 18th February, 2021 with liberty to re-file before the competent court.

CONTENTIONS OF THE PETITIONER:

3. Mr. Nikhil Majithia, learned counsel for IRCTC, has made the following submissions:

3.1. The Impugned Award is patently illegal and liable to be set aside as it is in direct contravention of: (i) Clause 2.4 read with Annexure-F of the tender document, (ii) Letter of Award dated 06th October, 2016, (iii) Policy decision dated 07th February, 2016, (iv) Letter of Acceptance dated 08th October, 2016, and (v) Agreement dated 29th September, 2017.

Regarding welcome drink -

3.2. The Sole Arbitrator ignored the instructions that expressly mentioned welcome drink, as contained in Clause 1.5 the Railway Board Commercial Circular No. 32 of 2014 [*hereinafter referred to as 'CC No. 32/14'*], which provided that welcome drink will be served to all passengers of A.C. classes on commencement of the train journey. This circular was attached as Annexure-D to the tender document. It was also specifically incorporated in Clause 2.1 of the tender document, which stated that service provider is required to provide free-of-cost catering to passengers as per menu and instructions contained Clause 1.5 of CC No. 32/14.

3.3. Since DC failed to provide welcome drink to passengers for an initial period of two months, IRCTC was compelled to step-in and provide the same. Thus, the cost borne by IRCTC was liable to be adjusted against bills raised by DC.

- 3.4. Moreover, since DC had no difficulty in providing welcome drink on its account after 18th June, 2017, this indicated that its claim was not genuine.

Regarding GST-

- 3.5. Clause 2.4 of the tender document clearly provided that service charges would be payable to the service provider as per the table of rates provided in Annexure-F of the tender document. The rates prescribed in Annexure-F were the highest that could be paid to a bidder, who were otherwise free to quote lower values in its bid. DC's financial bid, instead, quoted the rates as provided in Annexure-F, which were inclusive of taxes. There could thus be no deviation from the same. Having quoted an amount of Rs. 84/- (inclusive of tax) as part of its bid, DC could not be permitted to turn around and claim any tax in addition to the agreed rate. Further, production charges, while using the term 'inclusive of taxes', does not specify which taxes are being included, hence, by definition, it is to be construed widely as encompassing different types of taxes, regardless of the nature or incidence of taxation.
- 3.6. Moreover, DC willingly entered into Agreement dated 29th September, 2017 by which the parties expressly agreed to be bound by the terms of the tender document, the financial bid submitted by DC, the Letter of Award dated 06th October, 2016 as well as Letter of Extension of License 07th June, 2017. This Agreement was executed after the introduction of GST (July 2017) and DC never raised any issue about claim of GST on production charge not being covered by

the contract between the parties. Moreover, as per Clause 6.8 of the General Conditions of License (contained in Annexure-H of the tender document) no verbal or written arrangement would be binding upon IRCTC until the same was incorporated by a formal signed instrument. In other words, there could be no novation of the contract which was executed pursuant to a written bid.

- 3.7. Under Clause 11.2 of the General Conditions of License, responsibility for payment of all “taxes/duties service tax and other liabilities in respect of the business” (*sic*) lay on DC.
- 3.8. The claim of service tax as well as GST on production charges was identical. The rate of Rs. 84/- (inclusive of tax), agreed by the parties by virtue of Clause 2.4 of the tender document read with Annexure-F, included neither the earlier service tax, nor the new GST. The Arbitrator framed two issues on this aspect, viz., claim of service tax and claim of GST. Later on, DC gave up its claim of service tax on production charges, as recorded in the Order of the Arbitrator dated 18th November, 2020. As DC itself gave up the claim of service tax on production charges, its claim regarding GST, being identical, was also untenable.
- 3.9. There was no incidence of tax for levy of GST, and moreover no such plea on this account was made by DC.
- 3.10. The words “inclusive of tax” mean taxes which are applicable as on date of contract/document, but do not include future taxes, such as GST.

Regarding mandate of arbitrator-

- 3.11. By way of the Impugned Award, The Sole Arbitrator had proceeded to rewrite the contract between the parties, which is impermissible. It is settled law that an arbitrator cannot act beyond the terms of the contract. Reliance was placed upon: *SAIL v. J.C. Budharaja, Government and Mining Contractor*,¹ (ii) *ONGC v. Saw Pipes Ltd.*,² (iii) *DDA v. R. S. Sharma*,³ (iv) *ONGC v. Wig Brothers Builders and Engineers Pvt. Ltd.*,⁴ (v) *Associate Builder v. DDA*,⁵ (vi) *Ssangyong Engineering Construction Limited v. NHAI*,⁶ (vii) *South East Asia Marine Engineering & Construction Ltd. v. O.I.L.*⁷
- 3.12. It was not open to the arbitrator to comment upon the fairness of a contract which was voluntarily agreed upon and executed between the parties, or to grant anything contrary to the terms of the contract. In this regard, reliance is placed upon the decision in *Assistant Excise Commissioner v. Issac Peter*.⁸

CONTENTIONS OF THE RESPONDENT:

4. Mr. Naresh Thanai, learned counsel for DC, on the other hand, controverted the above submissions on the following grounds:
- 4.1. The Arbitrator has correctly appreciated the terms of the tender and the evidence/material placed before him.

¹ (1999) 8 SCC 122.

² (2003) 5 SCC 705.

³ (2008) 13 SCC 80.

⁴ (2010) 13 SCC 377.

⁵ (2015) 3 SCC 49.

⁶ (2019) 15 SCC 131.

⁷ (2020) 5 SCC 164.

⁸ (1994) 4 SCC 104.

- 4.2. There is no illegality in the Impugned Award which could call for interference of this Court. It is settled position that even if there are two views possible, the Court would not substitute the view of the Arbitrator's with its own view, unless the view taken by the Arbitrator is perverse.

Regarding welcome drink:

- 4.3. Annexure-E to the tender document specifically contained the services which were required to be rendered by a service provider, and provision of welcome drink did not form a part of it.
- 4.4. Clause 1.5 of CC No. 32/14 provided that welcome drink was to be served free of cost to the passengers on their commencement of journey, and whenever followed by breakfast, then Frooti was not to be served in breakfast. Further, in 2014 when the said circular was issued, composite contracts were being awarded. The unbundling of services was introduced in the year 2016, and it was admitted by IRCTC's own witness that CC No. 32/14 had rates of composite contract for the service provider.
- 4.5. IRCTC's policy decision dated 7th February 2017 was challenged by DC on 10th and 13th February, 2017 to the effect that no tender was floated with respect to welcome drink, nor was a bid submitted by DC for the same. However, IRCTC insisted on welcome drink in its letters dated 22nd and 28th February, 2017, and thus, on 2nd March 2017, the same was agreed by DC but without prejudice to its objections and its demand for claiming charges for the additional service provided from 5th March, 2017.

Regarding GST

- 4.6. When the temporary licence was awarded to DC in 2016, VAT (Value Added Tax) was being levied on production charges by each State individually. As a train travels through several States, and every State had a different rate of VAT, it was not feasible to account for the same. Hence, Annexure-C of the tender document stated that production charges were inclusive of tax, and service charges were exclusive of tax. While VAT was to be deposited by the service provider, service tax was exclusive, and was paid by IRCTC on proof of deposit of the same by DC with the concerned authorities.
- 4.7. GST on production charges is exclusive. i.e., over and above, and thus, payable by IRCTC. The GST laws introduced with effect from 01st July 2017, repeal the VAT as well as service taxes, but render GST leviable on production charges as well as on service charges. The production charges alleged to be inclusive of GST have been bifurcated by IRCTC. IRCTC paid GST on the service charges, but for erroneous reasons, not on production charges.
- 4.8. Clause 5.2 of CC No. 32/14 provided that any applicable taxes notified by the Government from time to time were to be collected by Zonal Railways from the passengers, and the service provider was to be paid taxes accordingly, subject to proof of deposit.
- 4.9. Upon GST coming into effect from 01st July, 2017, the Railway Board notified Commercial Circular No. 44 of 2017 dated 29th June, 2017 [*hereinafter referred to as 'CC No. 44/17'*] through which it was directed that GST was to be reimbursed to the service provider on

submission of proof of deposit. It was further directed that catering charges (which are same as in CC No. 32/14) along with 18% GST shall be paid to the service provider. It is evident from CC No. 44/17 that GST was in addition to i.e., over and above, the production charges. Thus, DC was entitled to GST in addition to the production charges. While CC No. 44/17 was not filed by IRCTC, the Sole Arbitrator had noted and reproduced its relevant clauses in the Impugned Award.

4.10. Further, the input credit/benefit of GST which is payable on production charges as also on service charges by DC, is available to IRCTC, unlike in the VAT regime, whereunder input credit of VAT deposited by DC was not available to IRCTC.

4.11. Even in the Agreement dated 29th September, 2017 which was effectuated post GST regime, there was no exclusion of GST from the word “taxes”. Hence, GST must be reimbursed to DC by IRCTC.

ANALYSIS:

5. The challenge in the present petition is to an award that has been termed as an ‘interim award’. But for all intents and purposes, it is final, as it determines the issues that arose for adjudication during the proceedings with finality, and conclusively fixes the liability. Only the calculations of the amounts due, on the basis of the findings in the Impugned Award, have been deferred.

6. That said, in order to decide IRCTC's objections to the Impugned Award, we must be reminded of the scope and ambit of this court's jurisdiction under Section 34 of the Act. The law on the subject is now well settled. It has been held in umpteen number of decisions of the Apex Court as well as this court, that an arbitral award can be assailed only on the grounds enumerated under the Act, as interpreted and explained by way of judicial pronouncements. The ground of patent illegality argued by IRCTC is no doubt one of the grounds available for setting aside an award, however, it is attracted only if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at the same. With respect to the other ground urged by IRCTC pertaining to Section 28(3) of the Act, alleging that the Impugned Award is contrary to the express provisions of the contract between the parties, the legal position is no longer *res integra*. An award can be held to be perverse only if the construction of the contract is such that no reasonable person would take such a view, or if the view of the arbitrator is by no means a possible view. In ***Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.***,⁹ the Supreme Court, while explaining the scope of such interference under Section 34 of the Act, observed that the court's approach under the said provision is different and cannot be equated with normal appellate jurisdiction. Unless the Court comes to a conclusion that the perversity of an arbitral award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award, interference is not warranted. Thus, it emerges that if two views are possible, the court would not interfere, and the view taken by the Arbitral tribunal would prevail so

⁹ 2019 SCC Online SC 1656.

long as it is supported by reasoning. Keeping the above factors in mind, the court now proceeds to deal with the objections raised by IRCTC to the two claims allowed by the Sole Arbitrator in favour of DC by virtue of the Impugned Award. The third claim rejected by the learned Arbitrator has not been made the subject matter of the present challenge before this court.

Whether welcome drink formed a part of initial period of contract?

7. IRCTC vide letter dated 7th September, 2016 invited bids for award of temporary license for onboard catering services in the subject train for a period of six months through partial unbundling of services model. Clause 2 of the tender document provided for the ‘Scope of Work’, relevant portion whereof, reads as follows:

“2.1. Catering services and Menu & Rates

The Service Provider is required to provide catering services free of cost to the passengers as per the menu and instructions contained in Railway Board Circular No.32/2014 which is enclosed as Annexure “D”.

The sector wise catering services to be provided to the passengers are enclosed as Annexure “E”. The menu and sector wise services are subject to revision by IRCTC from time to time.

xx ... xx ... xx

2.3. Additional catering services due to late running etc.

Service Provider will provide additional catering services due to late running of the train for more than 2 hours or other emergencies etc. as per Railway Board Circular No.32/2014 which is enclosed as Annexure “D”. The additional meal services shall be provided free of cost to the passengers.

2.4. Supply of Lunch/Dinner by IRCTC

The IRCTC shall supply duly packed dinner/lunch menu from its own base kitchens/approved sources. Service Provider will be required to depute its representative to pick-up meal from IRCTC units (transportation by IRCTC) for which an indent for number of meals required, along with its

veg. and non veg. break up, must be placed to the designated officials. The indent for meals must be placed minimum 6 hours before the schedule departure of the train.

Service Provider will be paid services charges for service of dinner/lunch supplied by IRCTC units. Service Provider shall be responsible for provision of other services, including arrangement for meals/snacks etc., as required to be provided during the course of journey.

Service charges payable for services where IRCTC has supplied material and catering charges payable for supply of food and for services where material is also supplied by the Service Provider is indicated at Annexure-“F”.

2.5. Provision for onboard meals

The casseroles packed meals shall be supplied from IRCTC designated Base Kitchens. All other items necessary for service to all classes of passengers, as per the guidelines, shall be arranged by the Service Provider. Service Provider shall arrange necessary service gears & equipments including disposables viz. service trays, paper napkins, tray mat, paper cup, thermo flask etc. for provision of onboard services of meals to passengers travelling in all classes of train. Service Provider shall also ensure availability & usage of necessary numbers of crockery, cutlery, glassware & service equipments & all other block stock, as may be required, for service of onboard catering services to passengers.

xx ... xx ... xx

2.7. Modification/improvement in menu and charges payable

The menus given are prescribed minimum menus and can be modified/improved with the approval of IRCTC from time to time. Similarly, the charges payable may also be revised in case of additional items introduced or due to change of policy.

xx ... xx ... xx

2.16. Payment to the Service Provider

Payment for the on-board catering services will be made by IRCTC to the Service Provider on the basis of the number of passenger served over different pair of stations on agreed rates from time to time. The Service Provider shall submit separate bills for supply of food and service charges periodically (periodicity of bills as decided by IRCTC), along with certificate of the Train Supdt. IRCTC will make necessary statutory deductions of tax at source and any other deduction in respect of the onboard catering services.”

8. The list of sector-wise catering services (i.e. meals such as morning tea, breakfast, lunch, evening tea, and dinner) required to be rendered by a service provider for each pair of stations, during the journey of the subject train, are specifically provided in Annexure-E to the tender document. DC submitted its quotation for such sector-wise services in the format prescribed in Annexure-C. None of the above noted documents mentioned of a welcome drink.

9. However, the controversy arises as the tender document refers to CC No. 32/14. This circular - CC No. 32/14, which is Annexure-D to the tender document, gets incorporated by way of reference *vide* Clause 2.1, extracted above. This clause requires the service provider to deliver free-of-cost catering to passengers, as per the menu and instructions contained in CC No. 32/14. The menu options are provided in Annexure-A to CC No. 32/14. The said circular mentions provision of welcome drink under Clause 1, titled 'Rationalization of Menu', relevant portion whereof reads as under:

"1.5. Welcome Drink will be served to all passengers of AC Classes (1A/EC & 2A/3A/CC) on commencement of the journey, however, whenever the Breakfast is followed immediately after Welcome Drink, then Frooti, the Tetra Pack drink hitherto being provided along with Breakfast will not be served. In case of service of subsequent breakfast during any journey, drink/Aerated Drink/Chach/in Tetra Pack will continue to be served."

10. Since CC No. 32/14 is undeniably a part of the tender document, the next question which arises is whether DC was contractually bound to provide welcome drink as part of the license condition. On this issue, the learned Arbitrator meticulously examined the tender conditions, circulars issued by Railway Board, IRCTC's policy, contractual provisions, and

testimonies of the witnesses, and went on to answer the question in the negative.

11. The findings rendered by the Arbitrator on this aspect, in para 18 of The Impugned Award, are summarized as under:

- 11.1. For the period of 19th December 2016 to 04th March, 2017, it is not disputed that the welcome drink was provided by IRCTC. DC was asked to take over the supply of the same only *vide* letter dated 10th February, 2017, which eventually commenced from 5th March, 2017 onwards.
- 11.2. IRCTC contended that it was constrained to provide welcome drink due to: (a) DC's failure to provide the same, (b) at DC's instance, and (c) in order to avoid public complaint. This stance cannot be believed and is self-contradictory. If welcome drink was indeed part of the contract, and DC was not fulfilling its obligation, IRCTC would not have intervened and provided the welcome drink for two months; nor taken two months to raise the issue with DC. This indicates that IRCTC was itself unclear about the contractual stipulations. The justification offered for carrying out an obligation outside the contract - at the instance of DC, is improbable. IRCTC's witness himself admitted that there was no written request received in this regard from DC. That the requests would be made orally is inconceivable, particularly in light of the other letters written by DC raising its grievances.
- 11.3. The quotation under the bid was invited through partial unbundling mode, which started in the year 2016. Therefore, it is imperative to

understand the scope of services covered under the bid. Annexure-E of the tender document, which lists out sector-wise services that were required to be provided by a service provider under the tender for a given train, nowhere mentions either that a welcome drink is required to be served by the service provider, or that it is complimentary.

- 11.4. The policy decision issued *vide* letter dated 7th February, 2017, was a fresh decision taken by IRCTC after the commencement of the licence period, and not a clarification. It determined, for the first time, the items that were required to be served to the passengers in the form of welcome drink. It *inter alia* states that, “It has been decided that onboard service provider will provide the welcome drink as was being done during departmental operation. No extra charge payable to the service provider.” (emphasis supplied). No document was placed on record by IRCTC to show the earlier position so that it could be inferred what was being done during the departmental operation, prior to unbundling. Even the regional offices of DC were not clear as to what was to be done in this regard. Therefore, it cannot be said for certain that it was the service provider’s duty to supply the welcome drink as was being done earlier when the catering services were being operated by the Railways. The approval for brands of welcome drink was on a temporary basis, which showed that there was a presumption that the supply of welcome drink was the responsibility of IRCTC, before the above policy decision was implemented. The policy decision also refers to the exercise to implement the Railway Board Budget

announcement (2016-17) regarding unbundling of catering services. This indicates that it was a fresh policy decision altogether and the same was implemented after the license came into force.

- 11.5. There is no express provision in the tender document or in the Letter of Award dated 6th October, 2016 that welcome drink to the passengers is to be supplied by DC. While the rates for specified services (meals) were called for, but rates for welcome drink were not invited, and thus DC did not bid for the same. It cannot be assumed that welcome drink was part of the service to be provided by DC. Even if it is presumed that the policy decision of 07th February, 2017 was part of the tender document, it would not make any difference. The policy does not specifically mention that the items for which the rates have been called for, would include the welcome drink. The obligation to provide the welcome drink foisted through the afore-noted policy decision is an after-thought. It is highly unreasonable conduct on the part of IRCTC to enforce the provision of welcome drink without offering any compensation.
- 11.6. DC, when agreeing to supply the welcome drink *vide* letter dated 13th February, 2017, specifically informed and insisted that it will claim the charges for provision of welcome drink in its bills. Therefore, IRCTC cannot claim that DC had given its consent to the policy decision dated 07th February, 2017 unconditionally.

12. The learned Arbitrator has analysed the legal effect of CC No. 32/14 on the tender conditions. IRCTC's witness (RW-1) admitted in his cross-examination that the unbundling process started in the year 2016 and that

CC No. 32/14 dated 6th August, 2014 laid down rates of composite contract for the service provider. Noting the admitted position that catering services under the tender were invited through the mode of partial unbundling of services, the learned Arbitrator analysed the scope of work and the formats provided for sector-wise quotations to determine the true intent of the parties. He noted that DC was required to provide quotations for the sector-wise services mentioned in Annexure-E, in the form provided in Annexure-C, both of which had no direct or specific reference to the condition of providing a welcome drink. In these circumstances, he concluded that the bid was not invited for the service of provision of welcome drink, and thus no charge was quoted towards the same by DC. CC No. 32/14 provides for composite rates, and thus cannot determine the contractual obligation on this issue which emerged from an unbundled model. Hence, the learned Arbitrator gave a finding that there was no contractual stipulation in the tender document that specifically put the obligation on DC to provide welcome drink. The findings noted above have been arrived at by the learned Arbitrator based on evidence, and by taking into consideration the contractual terms placed before him. The reasoning is sound, credible and comprehensive.

13. Regarding IRCTC's emphasis on the binding effect of DC's 'unconditional acceptance' of the policy decision dated 7th February 2017, one can notice that the learned Arbitrator has carefully perused the chain of correspondence between the parties to determine the legal effect of the acceptance. IRCTC, *vide* letters dated 22nd February, 2017 and 28th February, 2017, insisted for welcome drink to be provided by DC. It is

significant to note that DC *vide* letter dated 2nd March, 2017, by categorically referring to earlier letters exchanged between the parties, and without prejudice to its rights and contentions, agreed to adhere to the policy decision dated 7th February, 2017, subject to the condition that it will commence serving welcome drink w.e.f. 05th March, 2017 and claim the charges in respect thereof from IRCTC. DC was thus compelled accept the policy decision which was done in good faith and was unambiguously conditional— DC claimed the privilege of the ‘without prejudice rule’ – keeping its rights and contentions open. Besides, this claim is restricted to the initial period of licence (i.e., from 19th December, 2016 to 18th June, 2017). Under these circumstances, DC cannot be barred from charging IRCTC for the provision of welcome drink during the period of 05th March, 2017 to 18th June, 2017. On the same principle, IRCTC cannot claim reimbursement for provision of welcome drink by adjusting bills received from DC between 19th December, 2016 to 04th March, 2017.

14. Pertinently, the contention that the policy decision dated 07th February, 2017 became a part of the contract between the parties has rightly been disallowed by the learned Arbitrator, by holding the same to be a fresh policy decision brought in by IRCTC post entering into the licensing agreement with DC. IRCTC could not give any justification for bearing the burden for the initial period between 19th December, 2016 to 4th March, 2017, despite it's alleged understanding to the contrary. Its continued supply of welcome drink without expressly affirming that the contractual obligation for the job lay on DC, reaffirms the uncertainty of contractual obligations. On the basis of the conduct and the testimony of witnesses, the learned

Arbitrator has rightly held that the actions of IRCTC exhibit ambiguity about DC's contractually stipulated obligations, which were then redressed by way of the *ex post facto* policy decision.

15. Thus, the interpretation of the contract, as done by the learned Arbitrator, is based on the conduct of the parties, the contractual stipulations, as well as the evidence on record. This court finds reasoning supporting such interpretation to be rational, balanced, and germane, and sees no reason to disagree with the same, especially when construction of contract falls within the realm of an arbitrator's jurisdiction. For the aforesaid reasons, the court finds no merit in this ground of challenge.

Regarding GST

16. Learned Arbitrator has allowed DC's claim entitling it to GST on production charges / supply of meal, post the introduction of the GST regime, for reasons disclosed in para 19 of the Impugned Award, which are condensed as follows:

16.1. CC No. 44/17 pertains to the applicability of GST on catering services in railways. Para 1 thereof stated that: "*For Rajdhani/ Shatabadi/Duronto and other Mail/Express trains – 18% with full Input Tax Credit (ITC).*" Para 3 provided the revised catering apportionment charges for the said trains. Para 4 stipulated that in case of such trains, where catering charges are part of the ticket fare, amount of GST is to be reimbursed to the service providers on submission of proof of deposit of the same with the concerned

authorities. Zonal railways/ IRCTC shall ensure that the GST collected from the passengers is deposited with the concerned Authorities as per the guidelines/ procedures laid down by the Ministry of Finance. To ensure the same, Zonal Railways shall also obtain monthly proof of compliance of tax deposit by the service providers as per procedure. From the above, it is clear that GST is to be reimbursed by IRCTC upon submission of proof of deposit by DC.

16.2. In CC No. 32/14, para 5.1 clearly mentioned that Service Tax was to be paid separately, subject to proof of payment. Para 5.2 mentioned that any applicable taxes which are notified by Government of India (Ministry of Finance, Department of Revenue notifications) or State Governments from time to time were to be collected by the Zonal Railways from the passengers, in the ticket fare. The service provider was to be paid the taxes accordingly, subject to submission of proof of deposit. Therefore, it can be seen that the policy stipulated in CC No. 44/17 is also in consonance with the policy decision which was followed in the CC No. 32/14.

16.3. The contention of IRCTC, that CC No. 44/17 does not form part of the tender document, is not valid. Under CC No. 32/14, all applicable taxes are to be reimbursed to DC. IRCTC's witness (RW-1) has admitted in his cross-examination that the instructions issued by Railway Board are statutory instructions binding upon IRCTC. He further admitted that CC No. 44/17 was issued by Railway Board regarding GST. Further, in respect to a specific question regarding the instructions from the Railway Board in the above circulars, he also admitted that GST is in addition to production charges which are same

in CC No. 32/14 and CC No. 44/17. Even the tender document indicates that the “service tax” is to be paid extra, which means that “service tax” did not form part of the term “inclusive of taxes”.

16.4. GST regime has been introduced by the Central Government and is applicable to the services being provided by DC and is not in lieu of VAT, which has since been abolished. Therefore, the payment of GST on production charges is admissible to DC, which is to be reimbursed upon furnishing proof of deposit of the same with the concerned authorities.

16.5. DC’s witness (PW-2 named Nitin Goel) in his examination-in-chief gave details of GST deposited by DC by way of challans for the period from 1st July, 2017 onwards, details whereof were submitted to IRCTC. IRCTC’s witness (RW-1), in his cross-examination, when confronted with GST challan forms, admitted that the GST to DC was paid on the basis of said challans. He also admitted that invoices uploaded in GSTR-1 by DC are reflected in GSTR-2 of IRCTC. He further admitted that payment to DC was made on the basis of verification of the records submitted by DC, as well as GSTR-1. He also admitted that IRCTC did not pay GST amount on the production charges as claimed by DC.

17. The quotes for supply/production of food in terms of Annexure-F were inclusive of taxes. There was no GST on production of food, neither on the date of tender nor on the date of award of licence. It was introduced much later, with effect from 1st July 2017. Would this tax be reimbursable to

DC, or, in light of contractual provisions, it would be included in the rates quoted in the tender, was the question before the Arbitrator.

18. On this issue, Clause 5.1 & 5.2 of CC No. 32/14, dealing with applicability of taxes, are relevant and the same read as under:

“5.1 Service Tax is to be paid separately subject to proof of payment which has been calculated at the present rate notified @8.66%. The difference between the charges mentioned in column 2 and 3 above would be available with the Railways for payment of service tax etc. Due to changes in catering charges the license fee must be reassessed and realized as per the guidelines issued vide CC-35/2010 (Catering Policy-2010), CC-82/2012 (correction slip No.2 to Catering Policy-2010) and other instructions issued in this regard by the Board's office from time to time, the catering charges indicated in Para 4.1 above do not include charges for packaged drinking water, newspaper, etc. as they are included in the basic ticket fare. Reimbursement for these services will be made separately as per extant guidelines.

5.2 Any applicable taxes which are notified by Government of India (Ministry of Finance, Deptt. of revenue notifications) or State Governments from time to time are to be collected by the Zonal Railways from the passengers of Rajdhani/Shatabdi/ Duronto trains in the ticket fare. The licensee is to be paid the taxes accordingly subject to proof of payment by the licensee to the concerned Government Authorities.”

19. On a plain reading of the above, it is clear that clause 5.1 provides that Service Tax was to be paid separately, subject to proof of payment. Clause 5.2 on the other hand deals with future taxes.

20. The GST laws has replaced the erstwhile indirect taxation regime. This value added tax subsumed several indirect taxes, including VAT, which was an indirect tax, levied state-wise. Earlier, VAT was levied on production, in accordance with State-specific VAT Acts, which was being

borne by DC. DC has explained that since the trains were moving through several states and each state had a different rate of tax under State VAT laws, it was not feasible to account for the same, therefore production charges were paid inclusive of taxes. Besides, no Input Tax Credit was available to IRCTC for VAT. However, the position underwent a change with the introduction of GST laws. GST is available as Input Tax Credit for paying the outgoing tax liability. With restructuring of indirect tax system, railways introduced CC No. 44/17 which specifically provides for GST on catering services in the subject trains. The bifurcation of production charges was done under the afore-noted circular and it was advised that GST is to be reimbursed to the service provider on submission of proof of deposit. Para 3 of the said circular specifies the revised catering apportionment charges for the trains in question where catering charges are built-in to the ticket fare. The table thereunder shows '*catering charges disbursed to the service provider*' both with and without 18% GST in separate columns.

21. The learned Arbitrator has based his findings by relying upon the Circulars issued by the Railway Board which as per the contractual scheme, are binding on IRCTC. The contention of IRCTC that the production charges being 'inclusive of taxes' would also encompass GST and/or restrict inclusion of any other tax is thus not in consonance with the terms of the contract.

22. The court also does not find any merit in the contention of IRCTC that claim of service tax on production charges was identical and since the same has been given up, the claim of GST does not survive. Although

service tax has been subsumed in it, GST is nevertheless a new tax. Applicability of service tax on production charges is a different plea intertwined with determination of factual position of whether there is an incidence of service in the activity of production or if the nature of service could be held as a composite supply. In fact, the decision of the Delhi Authority for Advance Ruling,¹⁰ relied upon by IRCTC, which clarifies the legal position, has been completely misinterpreted and exhibits a misconceived understanding of the dispute. In ground G of the petition, IRCTC contends that:

“... the said authority clearly stated that supply/ production of food does not have any element of service and thus no liability of service tax is attracted thereon. It has further been stated that no element of service being thereon, there is no incidence of GST too.” (emphasis supplied)

23. This interpretation is wholly misconceived, untenable and is also completely contrary to the holding of the Authority, which expressly states that:

“24. In the case of supply of food and beverages (cooked/ MRP/ packed) on board the Mail/Express trains by the applicant directly to the passengers as per the menu/rates fixed by IRCTC/ Railways does not have any element of service and hence the same shall be considered as pure supply of goods and GST shall be charged on individual items at their respective applicable rates.” (emphasis supplied)

24. GST is clearly attracted on supply of food, as held by the Authority. Be that as it may, the claim of service tax over and above the amounts agreed to in Annexure-F, was premised on a different footing and cannot be read at par with the claim of GST. Since there is no incidence of ‘service’ in

¹⁰ Advance Ruling No. 02/DAAR/2018 dated 28th March, 2018 (in Application No. 02/DAAR/2017 dated 29th December, 2017).

the service of supply/production of food, as held by the Authority, perhaps DC prudently decided to give up the claim of service tax for the period prior to 1st July, 2017, and to pursue only reimbursement of GST post its introduction. Nevertheless, the giving up of a claim cannot be read as a demerit or detriment for remainder of the claims.

25. The reliance on clause 11.2 of the General Conditions of License is equally misplaced. This clause reads as follows:

“11.2. Payment of taxes/ dues – The Service Provider will be liable for payment of all taxes/duties service tax and other liabilities in respect of the business”.

26. IRCTC has argued that under this clause, the responsibility of payment of all tax liabilities was on DC. But the aforesaid clause does throw any light on the liability of GST. Then, on facts, the learned Arbitrator has given a finding that GST has been deposited by DC and proof thereof has been furnished to IRCTC. IRCTC's witness admitted that tax invoices uploaded by DC under GSTR-1, in the return filed for outward supplies, have been reflected in GSTR-2, in the return of inward supplies of IRCTC, which is auto populated on the basis of GSTR-1. The tax paid to DC would thus be available as ITC for IRCTC to pay its outgoing tax liability. Further, in the train fare, GST charges are being included and recovered from the passengers on production of catering services (i.e. meals) at the agreed rates in terms of CC No. 44/17 as extracted above. For the above reasons, the court does not find any fault with the interpretation of the relevant terms of the contract.

27. Next, the judgments relied upon by IRCTC are not applicable in the facts of the case. Although there can be no quarrel on the legal proposition canvassed by IRCTC that, while interpreting the contract, the document(s) forming the contract have to be read as a whole; and that the Arbitrator cannot travel outside the bounds of the contract. In the opinion of the court, the interpretation of the terms of the contract by the learned Arbitrator is fair and reasonable, and none of the grounds for interference provided under the Act are attracted. Upholding the claim for payment of GST is not stepping out of the confines of the terms agreed upon by the parties. The learned Arbitrator has decided the dispute within the four corners of the contractual provisions, in light of the change in tax regime brought about by the introduction of GST laws. It cannot be held that his findings are unfair or suffer from perversity. Therefore, the court cannot hold the reasoning to be wholly unsustainable, in the absence whereof, it is impermissible for the court to interfere.

28. In view of the foregoing, no ground for interference in the Impugned Award is made out. The petition is dismissed in the afore-noted terms. Pending application also stands disposed of.

SANJEEV NARULA, J

JULY 5, 2021

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