



NEUTRAL CITATION NO: 2022/DHC/002226

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgement reserved on: 27.01.2022

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Judgement pronounced on: 02.06.2022

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FAO(OS) (COMM) 106/2021 & CM APPL. 27234/2021

INDIAN RAILWAY CATERING AND TOURISM
CORPORATION LTD.Appellant

Through

Mr Nikhil Majithia, Adv.

versus

M/S DEEPAK AND CO.

.....Respondent

Through

Mr Naresh Thanai and
Khushboo Singh, Adv.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE TALWANT SINGH

[Physical Hearing/Hybrid Hearing (as per request)]

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RAJIV SHAKDHER, J.:

Preface:

1. This is an appeal, which is directed against the judgement of the learned single judge dated 05.07.2021. The learned single judge, *via* the impugned judgement dated 05.07.2021 has dismissed the petition filed by the appellant i.e., Indian Railway Catering and Tourism Corporation (hereafter referred to as “IRCTC”) preferred under section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as the “1996 Act”).

1.1 Resultantly, the learned single judge has sustained the award dated 15.12.2020, rendered by the sole arbitrator.

1.2 A perusal of the award dated 15.12.2020 shows, that it is a partial/interim award, and what remains to be done, is to consider and quantify the claims based on the findings rendered in the said award.

Background:

1.3 At this juncture, it would be relevant to note, that the sole arbitrator was appointed by this Court *via* order dated 13.08.2019, passed in a petition moved by the respondent i.e., the claimant under section 11 of the 1996 Act.

2. Concededly, the arbitrator was called upon to consider the following four aspects.

2.1 First, whether onboard catering services provided by the respondent under a temporary license issued to it also obliged the respondent to serve a welcome drink to the passengers who boarded the subject trains.

2.2 Second, whether the respondent was entitled to claim Goods and Services Tax (GST) on production charges/supply of meals after



01.07.2017, when the Goods and Services Tax Act, 2017 [“GST Act”] came into force.

2.3 Third, whether the financial burden concerning the food which got wasted due to cancellation or the failure of the passengers to turn up was required to be borne by the respondent.

2.4 Fourth, as to whether the respondent was entitled to the relief as claimed, which included a claim for interest.

3. The record shows, that issues on the same lines were framed by the learned arbitrator on 18.11.2020. It is also an admitted position, and something that emerges from the record that on 27.10.2020, before the learned arbitrator, the respondent gave up on its claim for service tax. Admittedly, insofar as the first two aspects are concerned, the learned arbitrator ruled in favour of the respondent. Insofar as the third aspect is concerned, the learned arbitrator rendered a decision against the respondent. Since a partial/interim award has been rendered, the fourth aspect referred to above has not been dealt with as yet by the learned arbitrator.

4. It is in this background, that arguments were advanced by counsel for the parties. Mr Nikhil Majithia advanced submissions on behalf of IRCTC, while Mr Naresh Thanai advanced arguments on behalf of the respondent.

Submissions of the appellant:

5. Mr Majithia's submissions can be, broadly, paraphrased as follows-

6. On the first aspect, Mr Majithia relied upon clause 2.1 of the tender and Commercial Circular 32/2014 (hereafter referred to as “CC 32/2014”) dated 06.08.2014. Based on the aforesaid documents, the argument made was that the respondent was obliged to provide a welcome drink to the passengers, who boarded the subject trains.



6.1 It was contended, that since the respondent failed to serve a welcome drink to the passengers for nearly two months, IRCTC was compelled to take the burden upon itself to provide the same.

6.2 In support of this plea, reference was also made to the policy decision, taken by IRCTC which is contained in its communication dated 07.02.2017 addressed to its Group General Managers posted in various zones. In this regard, reference was made to a specific communication dated 10.02.2017 addressed to the respondent whereby the policy decision taken by IRCTC on 07.02.2017 was brought to its notice. Attention was drawn by Mr Majithia to the letters dated 22.02.2017, 28.02.2017 and 06.04.2017, as well, which were addressed by IRCTC to the respondent.

6.3 Via these letters, IRCTC once again, was seeking to push the respondent towards acceptance of the conditions put forth in its policy letter dated 07.02.2017.

6.4 It was contended, that the said policy framed by IRCTC clearly provided, as was indicated in the follow-up communication dated 06.04.2017, that the respondent should unconditionally accept the proposal made in IRCTC's letter dated 07.02.2017 if it was desirous of having its temporary license extended by further six months. The respondent was accordingly asked to submit its unconditional acceptance within seven days, failing which it would be presumed that the respondent was not interested in having its contract extended.

6.5 Mr Majithia submitted, that the respondent gave its unconditional acceptance *via* communication dated 12.04.2017. In addition to the aforesaid, this submission was sought to be supported by referring to the respondent's letters dated 02.11.2017 and 16.03.2018.



6.6 The argument, thus advanced by Mr Majithia, was that the learned arbitrator had wrongly allowed the claim concerning the provision of welcome drink, on the ground that it did not form a part of the tender document and therefore, the deductions made by IRCTC on that score were untenable.

7. Insofar as the second aspect was concerned i.e., whether the respondent was entitled to claim GST on production charges/supply of meals after 01.07.2017, it was contended that the charges that were fixed for the supply of meals and rendering of services were provided in Annexure-F appended to the contract.

7.1 A careful perusal of Annexure-F would show, that where the service provider provided dinner/lunch, the maximum charge fixed in that behalf was Rs. 84/- (including taxes), whereas the rate for service charges was pegged at Rs. 14.56, albeit, excluding taxes.

7.2 Therefore, according to Mr Majithia, the learned arbitrator had incorrectly proceeded to hold that service tax did not form part of the amount that was to be reimbursed to the respondent.

7.3 Likewise, according to Mr Majithia, the learned arbitrator also fell into error by holding that the respondent would be entitled to payment of GST on food production charges on amounts reflected in Annexure-F of the tender document albeit after 01.07.2017 i.e., when the GST regime kicked in.

Submissions of the respondent:

8. On the other hand, Mr Thanai, rebutted the contentions advanced by Mr Majithia.

8.1 According to Mr Thanai, insofar as the first aspect was concerned i.e.,



the aspect concerning providing welcome drink to the passengers, it was emphasized that the decision to mulct the responsibility of providing welcome drink to the passengers onto the respondent was taken by IRCTC only after the commencement of the license period i.e., on 07.02.2017, as there was no specific provision made in that behalf in the tender document, or in the Letter of Award (in short LOA) dated 06.10.2016 issued to the respondent.

8.2 Emphasis was laid by Mr Thanai on the fact, that when bidders were asked to submit rates for specified services, the specified services did not provide that they were required to serve a welcome drink to the passengers. It is because of this, that the respondent, in its bid, did not provide any rates for serving a welcome drink to the passengers.

8.3 The reliance by IRCTC on CC 32/2014 was misplaced. This circular made a provision for rates concerning composite contracts. Since the unbundling process had commenced in 2016, the said circular had no application.

8.4 In this context, reference was made to the testimony given by RW-1 (IRCTC's witness). The learned single judge, having noticed that the arbitrator has analysed the relevant material, agreed with the view taken on this aspect of the matter in the subject award dated 15.12.2020.

9. As regards the second aspect, it was contended that after the GST Act came into force with effect from 01.07.2017, while IRCTC paid GST to the respondent *vis-a-vis* services rendered by it, it failed to remit applicable GST to the respondent on production charges, on the ground that the rates reflected in Annexure-F were inclusive of GST.

9.1 Mr Thanai contended, that the learned arbitrator, in this regard, had



correctly noted the contents of Commercial Circular 44/2017 (hereafter referred to as "CC 44/2017"), which was issued by the Railway Board on 29.06.2017, and the evidence placed on record by the respondent concerning the factum of deposit of GST on production charges.

9.2 The contention was, that the aforementioned circular dated 29.06.2017, in no uncertain terms, provided that GST had to be reimbursed to the service provider on submission of proof of deposit of the said tax with the appropriate government authority.

9.3 The fact, that the said circular was binding on IRCTC was sought to be established by referring to the testimony of RW-1. This aspect, according to Mr Thanai, was noticed by the learned arbitrator, while ruling on the issue in favour of the respondent.

9.4 Mr Thanai also adverted to the fact, that the learned arbitrator had observed that the GST regime applied to the services provided by the respondent and that the same was not in lieu of Value Added Tax (in short "VAT") as was sought to be portrayed by IRCTC.

9.5 Concerning this aspect, Mr Thanai made it a point to bring to our notice clauses 5.1 and 5.2 of CC 32/2014, which according to him were in line with clause 4 of CC/2017, to which, we have made a reference above. In support of his submission, Mr Thanai also alluded to the observations made by the learned single judge in paragraph 20 of the impugned judgement dated 05.07.2021.

Analysis and Reasons:

10. We have heard the learned counsel for the parties, and perused the record.

11. The following admitted facts emerge from the record, which, to our



mind, are relevant for adjudication of this appeal.

12. Upon IRCTC inviting bids on 07.09.2016 from empanelled parties, to provide onboard catering services, albeit temporarily, qua train no. 12951-52/12953-54 BCT-NDLS/NZM Rajdhani/August Kranti Rajdhani Express Train, the respondent was declared the highest bidder.

13. Consequently, a temporary license, spanning six months was issued in favour of the respondent by IRCTC *via* LOA dated 06.10.2016. The respondent submitted its Letter of Acceptance on 08.10.2016, which was followed by the execution of a formal agreement dated 29.09.2017.

14. The agreement only captured the various documents which formed a part of the said agreement, i.e., the tender, the bid, the LOA dated 06.10.2016, the Letter of Acceptance of award dated 08.10.2016, as also, the letter dated 07.06.2017, by which the temporary license was extended beyond the initial period.

15. The contractual arrangement, which was arrived at between the parties, concededly moved away from a composite contract to a partial unbundling model.

16. Concededly, between 19.12.2016 and 04.03.2017, welcome drink was provided to the passengers by IRCTC. According to the respondent, it did not provide the welcome drink during this period to the passengers, as it was not an obligation that it had undertaken, under the contractual arrangement arrived at between the parties.

17. IRCTC deducted the expenses incurred by it for providing welcome drink to the passengers during the aforementioned period i.e., from 19.12.2016 to 04.03.2017. The respondent's claim concerning the Welcome drink is thus confined to this period.



18. The IRCTC's justification for deduction of monies spent by it towards welcome drink is based on clause 2.1 of the tender, and Clause 1.5 of CC 32/2014. For the sake of convenience, the aforementioned clauses are set forth below:

“2. SCOPE OF WORK

2.1	<i>Catering services and Menu & Rates</i>	<i>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.</i>
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1. Rationalization of Menu

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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 tetrapack drink hitherto being provided alongwith Breakfast will not be served. In case of service of subsequent Breakfast during any journey, drink/Aerated Drinks/Chhach/Lassi/in tetra pack will continue to be served.”



19. A careful perusal of the 2.1 of the tender would show, that the service provider (i.e., the respondent) was required to provide catering services free of cost, as per the menu and instructions contained in CC 32/2014.

20. Furthermore, the sector wise catering services, that were to be provided to the passengers were outlined in annexure-E of the tender. Quite clearly, as found by the learned arbitrator as well, CC 32/2014 applied when composite contracts were in vogue. After 2016, admittedly, IRCTC had followed the unbundling of services model, and therefore the bidders (the respondent in this case), were required to provide sector wise catering services to the passengers.

20.1 In other words, their bids for services were set out against the sectors in which they were required to render service. Each sector comprised a pair of stations. Concededly, Annexure-E, which required sector wise catering services to be included, did not include amongst the services set forth therein, a provision for serving a welcome drink.

21. Therefore, quite clearly, the decision taken by IRCTC to have the service provider provide a welcome drink was taken only on 07.02.2017, by way of a policy framework.

22. The argument, that because circular CC 32/2014 was an integral part of the tender, and therefore under clause 1.5 of the said circular, the respondent was obliged to serve a welcome drink to the passengers is not consistent with the contents of Annexure-E, which is also a part of the tender.

23. The learned arbitrator, after appraising the evidence placed on record and interpreting the documents, has concluded that in the initial part of the contract which spanned six months, commencing from 19.12.2016 till



18.06.2017, the respondent was not obliged to serve a welcome drink to the passengers.

24. Insofar the period spanning between 05.03.2017 and 18.06.2017 is concerned, this was the period during which [according to the learned arbitrator] a welcome drink was provided by the respondent without prejudice to its rights and contentions to claim monies against the same.

24.1 This is evident from a perusal of letters dated 13.02.2017 and 02.03.2017.

25. It is only on 06.04.2017, when IRCTC indicated to the respondent, that unless it gave its unconditional acceptance to the policy framework captured in its communication dated 07.02.2017, its temporary license, which was expiring on 18.06.2017, would not be extended, that the respondent agreed to provide a welcome drink and bear the financial burden qua the same.

26. Faced with this difficult choice, and having regard to the fact that it had already invested funds in the contractual arrangement arrived at with IRCTC, on 12.04.2017, the respondent accepted the terms indicated in the communication dated 07.02.2017, concerning the supply of welcome drink for the period that was to extend beyond 18.06.2017.

27. Therefore, the claim of the respondent qua welcome drink was restricted to the period spanning between 19.12.2016 and 18.06.2017. To be noted, the temporary license was extended by IRCTC till 04.07.2018

28. The learned arbitrator, while ruling in favour of the respondent, concerning the provisioning of a welcome drink by the respondent has observed the following:



“18.3. It is clear that the initial period of contract for 6 months had commenced from 19th December 2016 and the welcome drink continued to be provided by the Railways, duly served to the passengers by the claimant, from 19th December 2016. This issue was raised for the 1st time by the respondent by the letter dated 7th February 2017 & 10th February 2017. And the claimant started serving the welcome drink from its own resources. After the letter dated 02nd March 2017 subject of course to the condition that the claimant would be charging for the supply of welcome drink and wet tissue. This was based on the contention that welcome drink did not form part of the tender document and therefore it was not to be provided by the claimant as per the contract between the parties.

18.4. On the other hand, the respondent has contended that Railway Board Circular No. 32 of 2014 is the part of the tender document, as Annexure D. Clause 1 of Annexure D deals with Rationalisation of Menu and Clause 1.5 states that "Welcome drink will be served to all passengers of AC classes (1A/2A & 2A/3A/CC on commencement of the journey, however, whenever the Breakfast is followed immediately after Welcome drink, 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/Lassi in Tetra Pack will continue to be served." It has been specifically denied that the catering services to be provided to the passengers did not include welcome drink, as alleged. The contention of the respondent is that supply of welcome drink to all the passengers was embodied in the commercial circular no. 32 of 2014, which was part of the tender document and the claimant was required to serve the same. Since the claimant did not initially provide the welcome



[sic; welcome drink] rank, the same was provided by the respondent at the instance of the claimant to avoid public complaint and the amount of such service was deducted from the bills of the claimant.

18.5. It may be mentioned that the bids/quotations for award of licence were invited by respondent vide letter dated 07.09.2016, which specifically say that quotations were invited for catering services through partial unbundling of services mode in the subject train. RW1 in his cross-examination admitted that unbundling process started in the year 2016 in itself, including the train in question. He further admitted that as per CC - 32/2014 licensees were awarded contract of all the services against which welcome drink was complimentary.

18.7. Therefore, it is clear that above-mentioned policy is issued vide letter dated 07.02.2017 (not 07.02.2019), after the commencement of the contract by the claimant from 19-12-2016. And it was a decision taken, not a clarification, after the contract had come into force, as it says "It has been decided that on-board service provider will provide the welcome drink as was being done during departmental operation. No extra charge payable to the Service Provider." Even the brands have been approved on temporary basis and the Zones were expected to define the originating points from where welcome drink services are required to be provided as was being done before unbundling. It was also mentioned that in case service provider is unwilling to take up the Welcome drink service at his own cost, he can be given, exit from the contract. Nothing has been mentioned as to what was being done during the departmental operation and before unbundling. It means, even the regional offices of the respondent were not clear as to what was to be done in this regard.



Moreover, even the brands were approved on a temporary basis for service in 2A/3A/CC. Moreover, the respondent was continuing to supply the Welcome drink to be served to the passengers by the claimant. It appears that there was a presumption that the supply of Welcome drink was the responsibility of the respondent before the above policy was implemented. It also refers to the exercise to implement the Railway Board Budget announcement (2016 – 17) regarding unbundling of catering services. It means it was a fresh policy altogether and the same was implemented after the contract came into force.

18.8. On the one hand, the respondent contends that the welcome drink was part of the contract because the Railway Board Circular No. 32/2014 was integral part of the tender document and on the other hand, it is issuing a fresh policy in 2017. Moreover, the respondent had continued to supply the welcome drink from its own resources. If welcome drink was part of the contract, there was no need for respondent to supply the welcome drink. If the claimant was not supplying the welcome drink, allegedly on the basis of the contract, why should the respondent take almost 2 months in reminding the claimant that it was its responsibility to supply the welcome drink. Therefore, the stand of the respondent is self-contradictory and it appears that the respondent itself was not clear about the responsibility of the claimant to supply the welcome drink. This is proved by the fact that the respondent continued to supply the welcome drink on its own without expressly telling the claimant that it was its responsibility to supply the welcome drink.

18.10. It may also be mentioned that even the items which were required to be served to the passengers in the form of the welcome drink were also



decided for the 1st time only, when this policy was issued by the respondent. It was also mentioned in this policy that the welcome drink is to be supplied as it was being done during the operation of the catering services. However, no document has been placed on record to show as to what was being done earlier. Therefore, it cannot be said for certain that it was the duty of the claimant to supply the welcome drink as it was being done earlier when the catering services were being operated by the Railways. It may also be mentioned that there was no express provision in the tender document that welcome drink is to be supplied by the claimant. This is clear from the fact that the rates were specifically called for only for the items which were specifically indicated in the tender document. The rates for welcome drink were not specifically called for and therefore the claimant did not bid for the same. If the respondent had clearly mentioned in the tender document that welcome drink was part of the package, the situation would have been different. However, since the rate had been called for by the claimant separately for the "evening tea, the dinner, the breakfast etc, therefore, it cannot, be presumed that the welcome drink was essentially a part of the service to be provided by the claimant.

18.11. Even if it is presumed for a moment that it was part of the tender document, it is not specifically mentioned as to which of the items, for which the rates been called for, includes the welcome drink. Even in the award letter dated 06th October 2016, it is not specifically mentioned that the welcome drink was to be provided by the claimant to the passengers. Therefore, as is visible from the policy dated 07.02.2017, it was just an after-thought on the part of the respondent that the welcome drink was to



be provided by the claimant from its own resources and that no payment for the same will be made to them in lieu thereof. It is just strange that while there is no specific mention about supply of the welcome drink by the claimant, yet it intended to force upon the claimant, to supply the same through its policy dated 07.02.2017, and that too without any payment of charges in lieu thereof. It is not understood as to how the claimant is supposed to provide any service without payment of any charges. Therefore, it is not feasible to agree to the argument of the respondent that the supply of the welcome drink was part of the contract and the claimant was expected to provide the same free of any charges and when it failed to provide the same to the passengers, the respondent was forced to provide the same from its own resources.

18.12. It is surprising that from the very initial period of the contract, while the respondent was supplying the welcome drink and thereafter developed the policy on 07.02.2017, it forced the claimant to supply the same without any charges. However, it may be mentioned that while agreeing to supply the welcome drink, the claimant also insisted that although they are starting to supply the welcome drink, yet they will claim the charges for the same through their bills. It may also be mentioned that after the claimant informed the respondent that they will start the supply of the welcome drink, subject, however, to claim the charges, no reply in this regard was given by the respondent to the claimant that they do not agree to the insistence of the claimant that they will claim the charges on account of supply of the welcome drink. Therefore, the respondent cannot claim that the claimant had given its consent to the policy dated 07.02.2017 unconditionally. Therefore, the claimant cannot be forced to



supply the welcome drink without payment of any charges to them.”

29. Therefore, the learned arbitrator, to our minds, correctly concluded that IRCTC could not have deducted the amounts expended by them towards serving welcome drink to the passengers from the bills of the respondent.

30. Insofar the second aspect is concerned, which is, whether IRCTC is obliged to reimburse the amount deposited by the respondent towards GST levied, with effect from 01.07.2017, on production charges, the argument advanced on behalf of IRCTC, is that, since production charges, unlike service charges, were inclusive of tax, the respondent is not entitled to payment sought by it towards GST.

31. In this context, it is submitted that the expression “tax” included all kinds of taxes, such as VAT, service tax, and central excise duty. The submission was that with the advent of the 2017 Act, several taxes, including VAT and service tax were supplanted with GST, and therefore the respondent’s stand, that it ought to be paid GST on production charges is contrary to the terms of the contract.

31.1 In this regard, our attention was drawn to Annexure-F appended to the tender document. According to Mr Majithia, the learned arbitrator had, therefore, erred in concluding, that GST was required to be reimbursed to the respondent, upon proof of deposit of the said tax with the concerned statutory authority.

32. Mr Majithia also brought to our notice, the fact, that between 01.07.2017 and 31.03.2018, GST on food production charges was to be paid at the rate of 18%, and that after 01.04.2018, the GST rate fell to 5%.

33. In sum, as per Mr Majithia, the rate fixed for meals supplied by the respondent, whenever there was a shortfall, was inclusive of taxes.



Therefore, according to Mr Majithia, Rs. 84/- per meal which was payable to the respondent, was inclusive of taxes, and over and above this, the respondent was required to be paid service charges for serving the meal to the passengers.

33.1 In support of this plea, our attention was drawn to the policy framework captured in IRCTC's letter dated 07.02.2017, and the correspondence which was exchanged between the parties.

33.2 In particular, reference was made to letters dated 10.02.2017, 06.04.2017 and 12.04.2017. Mr Majithia submitted, that the respondent, *via* letter dated 12.04.2017 accepted the changes brought about on 07.02.2017.

34. According to us, insofar as reimbursement of taxes deposited by the respondent is concerned, the same is governed by CC 32/2014 and CC 44/2017 as correctly noticed by the learned arbitrator.

34.1 Clause 5.1 of CC 32/2014 clearly provides, that service tax is to be paid separately (in this case, to the respondent) subject to proof of payment. Likewise, clause 5.2 of the very same circular i.e., CC 32/2014 provides that any applicable taxes which are notified by the Government of India (Ministry of Finance, Department 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 by embedding it in the ticket fare.

34.2 The clause goes on to state, that the licensees are to be paid taxes, subject to proof of payment by the licensees to the concerned statutory authorities.

35. It is not in dispute, that the respondent has given up his claim *vis-a-vis* service tax. However, as regards GST, in our view, when the parties had



arrived at the subject contractual arrangement, since CC 32/2014 was in force, it would be applicable as regards taxes, which the respondent was required to bear, and seek its reimbursement upon proof of payment to the concerned statutory authorities.

36. Likewise, clause 4 of CC 44/2017, in no uncertain terms, provides that in case of Rajdhani/Shatabdi and Duronto type trains, where catering charges are part of the ticket fare, GST is to be reimbursed to the service providers, on submission of proof of deposit of same with the appropriate statutory authority.

37. The learned arbitrator has returned a finding of fact, based on the evidence placed before him, that GST had been deposited. The learned arbitrator, by way of proof, has referred to challans which evidently did not advert to the trains. The record, however, shows that the respondent's witness PW-2 has taken the stand, "that invoices in respect of the GST are uploaded in the GRSTR1 and reflected in GSRT2 and can be verified..." by IRCTC.

38. What has also decidedly come through upon perusal of the record, is that where GST was payable at the rate of 18%, IRCTC could claim Input Tax Credit (ITC), and upon the rate being scaled down to 5%, ITC could not be claimed qua the same.

39. IRCTC also does not seem to have disputed the fact, that it has recovered GST from the passengers by factoring the same in the train fare.

40. Therefore, in our view, the argument advanced by IRCTC, that it is not obliged to reimburse GST to the respondent, even if it establishes proof of payment of same, seems completely untenable.

41. GST is a central tax, whereas VAT is a local tax, which various states



would have levied at the relevant time, when the 2017 Act had not been enacted. It appears, that because the VAT rates varied from state to state, production charges were made inclusive of tax at the relevant point in time. Since VAT, amongst other taxes, stands repealed, the respondent, rightly claims, that it should be reimbursed GST upon proof of payment of the same.

42. The learned arbitrator's findings, on this issue, with which we are in complete agreement, read as follows-

"19.15. Claimant has mentioned that it is indicated towards the end of the tender document that "Service tax is payable as per applicable rates." In this regard, the contention of the respondent is that the charges for the supply of food are inclusive of all the taxes. On the other hand, the contention of the claimant is that service tax is not included in the above charges. In para 5.1 of the CC- 32 of 2014, it is clearly mentioned that the Service Tax is to be paid separately, subject to proof of payment. In para- 5.2, it is 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 are to be collected by the Zonal Railways from the passengers of Rajdhani/Shatabdi/Duron to 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. Therefore, the CC - 44 of 2017 also is in consonance with the policy which was followed in the CC- 32 of 2014.

19.16. According to the claimant, since the VAT, Service Tax etc has been replaced by the GST, as it includes all the taxes, and the Service Tax is payable separately to the licensee, therefore, the GST is also admissible to



the Claimant. It has also been mentioned that the term "inclusive of taxes" means including the VAT, which was levied by each state separately at different rates and it was not practicable to apportion the same in the rates which have been quoted, because the payment was directly to be made by the claimant to the concerned state authorities. Since the VAT has now been abolished and the GST is directly applicable to the services being provided by the claimant, therefore, the GST is admissible to the claimant.

19.17 It has been argued by the respondent that CC – 44 of 2017 does not form part of the tender document, therefore, it is not-applicable in this case. This argument does not have any force because it has already been mentioned in CC - 32 of 2014 that all the applicable taxes are to be reimbursed to the claimant. Though, the respondent has argued that CC - 44 of 2017 does not form part of the tender document, yet RW1 admitted in his cross-examination that the instructions of Railway Board are binding upon respondent. Railways and the claimant. He further admitted that CC - 44 of 2017 was issued by Railway Board regarding GST. RW1 was specifically asked that as per the instructions from the Railway Board in the above circulars, GST is in addition to production charges which are same in circulars No. 32 of 2014 and 44 of 2017, to which RW1 replied in the affirmative and further said that the instructions issued by Railway Board are statutory instructions and have to be complied with as regards licensee of Railways also. 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." Since the GST regime has been introduced by the Central government and is applicable to the services



being provided by the claimant and is not in lieu of the VAT which has since been abolished, therefore, the payment of GST on production is admissible to the claimant. Claimant is to be reimbursed GST on deposit of the same with the concerned authorities.

19.18.PW2 Nitin Goel stated in his examination in Chief that GST for the period 01st July, 2017 onwards was deposited in time with the concerned authorities and the same was intimated to the respondent.

19.19.It is interesting to note that RWI, in his cross-examination was confronted with the GST challan forms, and he admitted that the GST to the claimant was paid on the basis of said challans. He further admitted that invoices uploaded in GSTR1 by claimant are reflected in GSTR2 to the respondent and that payment to the claimant was made on the basis of verification of the records submitted by the claimant and also GSTR1. RWI further admitted that respondent did not pay GST amount on the production charges as claimed by claimant.

19.20. Therefore, in view of the above, the Issue No. 2 is hereby decided in favour of the claimant and against the respondent, meaning thereby that the GST is admissible on production charges to the claimant post July 2017 as per the applicable rate of 18% and at the rate of 5% from 16.04.2018 onwards.”

43. Therefore, as correctly concluded by the arbitrator, GST from 01.07.2017 would have to be reimbursed to the respondent by IRCTC, upon the proof of deposit of the same with the concerned statutory authority.

44. Given the fact, that IRCTC has already factored GST in the train fare, lends heft to the stand taken by the respondent, that it should be reimbursed GST deposited by it with the concerned statutory authority. Furthermore, as



noticed hereinabove, IRCTC was in a position to, in fact, perhaps, claim ITC, at least for the period spanning between 01.07.2017 and 31.03.2018.

45. As regards the third facet, qua which the learned arbitrator has taken a view against the respondent, we are not required to deal with the same, as the respondent has neither made any submissions, nor filed any cross appeal qua the same.

Conclusion:

46. Thus, for the foregoing reasons, we are of the view that no interference is called for with the impugned judgement dated 05.07.2021.

47. The partial/interim award dated 15.12.2020, rendered by the learned arbitrator is neither patently illegal nor perverse, as was sought to be portrayed by Mr Majithia, on behalf of IRCTC.

48. Interpretation of the terms of contract, and appraisal of evidence is completely within the domain of the arbitrator. The Court cannot supplant its view with that of the arbitrator.

49. The appeal is, accordingly, dismissed.

50. Pending application shall, consequently, stand closed.

51. Parties will, however, bear their own costs.

RAJIV SHAKDHER, J

TALWANT SINGH, J

JUNE 02, 2022/

Click here to check corrigendum, if any