

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMM. ARBITRATION PETITION NO.454 OF 2024

Central Railway-Mumbai Division

.....*Petitioner*

: *Versus* :

A-1 Laundry Services (JV)

....*Respondent*

WITH
INTERIM APPLICATION NO.4173 OF 2025
IN
COMM. ARBITRATION PETITION NO.454 OF 2024

A-1 Laundry Services (JV)

.....*Applicant*

: *Versus* :

Central Railway-Mumbai Division

....*Respondent*

WITH
INTERIM APPLICATION (L) NO.18932 OF 2024
IN
COMM. ARBITRATION PETITION NO.454 OF 2024

Central Railway-Mumbai Division

.....*Applicant*

: *Versus* :

A-1 Laundry Services (JV)

....*Respondent*

Mr. Narayan Bubna, *for Petitioner & for Applicant in IAL/18932/2024.*

Mr. Arshad Shaikh, Senior Advocate with *Mr. Ranjit Agashe, Mr. Rajendra Jain, Ms. Namrata Agashe, Mr. Pranil Lahigade, Mr. Aniket Pardeshi i/b Ms. Vinsha S. Acharya, for Respondent & for Applicant in 1A/4173/2025*

CORAM : SANDEEP V. MARNE, J.

JUDG.RESERVED ON: 13 NOVEMBER 2025.

JUDG. PRONOUNCED ON: 21 NOVEMBER 2025.

JUDGMENT :

1) Petitioner-Central Railway has filed the present Petition under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) challenging the Award dated 7 March 2024 passed by the Arbitral Tribunal awarding sum of Rs.4,89,49,985/- in favour of the Respondent alongwith GST. The disputes between parties have arisen during performance of contract by the Respondent for collection of soiled linen from AC coaches, washing in mechanized laundry, supply and loading of washed linen into AC coaches. Out of various claims raised by the Respondent, the Arbitral Tribunal has awarded claims towards loss of linen, delay penalty, penalty over ceiling of 10%, fixed cost compensation and electricity charges totally amounting Rs.4,89,49,985/-.

2) A brief factual background in which the Arbitration Petition arises is stated thus:

Petitioner-Central Railway invited open tender dated 11 January 2010 for setting up and operating dedicated mechanized laundry in railway premises in Mumbai at Wadibundar Depot on Build-Own-Operate-Transfer model (**BOOT**) for initial period of 15 years including supply and installation of plant, equipment and related infrastructure (works) alongwith collection and transportation of soiled linen from coaches/trains and transportation/loading of washed and packed linen in the coaches/trains at Chhatrapati Shivaji Maharaj Terminus (**CSMT**), Lokmanya Tilak Terminus (**LTT**) and Dadar Terminus (**DT**). Respondent

participated in the tender process and emerged as a successful bidder. Respondent was awarded contract by the Petitioner at the cost of Rs.79,94,45,813/- for a period of 15 years from the date of commissioning of the plant. Contract Agreement dated 17 March 2012 was executed between the parties. The contract commenced from 16 April 2013.

3) During execution of the contract, disputes and differences arose between the parties and as per Clause-64(1) contained in the Regulation of Tenders and Contracts and General Conditions Of Contract dated 16 July 2020, the Respondent invoked arbitration clause and sought resolution of the disputes. The General Manager of Central Railways constituted Arbitral Tribunal comprising of three retired railway officials, Shri. Prashant K. Ranade, IRTS. Retd. CAO, System, CR as presiding Arbitrator, Shri. Chandra Mohan Jindal, Retd, DG. IRIFM and Shri. Alok Kumar Tewari, Retd. AM (EnHM), Railways Board as Co-Arbitrators.

4) The Respondent filed Statement of Claim claiming an amount of Rs.18,01,83,764/- from the Petitioner. The claim was resisted by the Petitioner-Railways by filing Statement of Defense. Both the sides filed various documents in support of their respective claims. It appears that oral evidence was not led by either of the parties. Based on documentary evidence and written arguments, the Arbitral Tribunal has allowed most of the claims sought for by the Respondent by its Award dated 7 March 2024. Petitioner-Railways are directed to pay to the Respondents aggregate claim amount of Rs.4,89,49,985/-. Aggrieved by the Award dated 7 March 2024, the Petitioner has filed the present Petition under Section 34 of the Arbitration Act.

5) Mr. Bubna, the learned counsel appearing for the Petitioner-Central Railway has submitted that the Arbitral Tribunal has erred in awarding claims to the Respondent relating to recovery of loss of linen covered by Issue Nos.1 and 2. That the Arbitral Tribunal ignored express contractual provisions for payment of costs of new items and has erroneously reduced the rate of recovery of loss of linen to 75% cost. That Clause-4.9(5) of the tender provided for recovery of lost linen at the rate of new items. Clause-5.9(iv) also provides that recovery shall be made at rates prevailing at that point of time. Clause-4.12 puts responsibility of accountal on the Respondent. Despite these contractual covenants, the Arbitral Tribunal erroneously reduced the rate of recovery to 75% by relying on railway circulars. The Arbitral Tribunal thus travelled beyond the covenants of the contract and took into consideration extraneous material while reducing the recovery amount to Rs.30,11,304/-. Mr. Bubna would further submit that the Arbitral Tribunal has erroneously reduced the amount of penalty for delay in delivery of washed items covered by Issue No.3. That Clause-5.9(iii) of contract provides for penalty of Rs.0.50/- per item per day for delay in delivery of washed linen. Clause-4.12 puts responsibility of accountal on the Respondent. The Arbitral Tribunal erroneously observed that though Railways had declared 88342 items to be lost, the Claimant did not accept the same due to which penalty of more than Rs.5 crores had accumulated. Without referring to any error in calculation, the Arbitral Tribunal erroneously interfered with the penalty contrary to the contractual clauses. Mr. Bubna would further submit that the Arbitral Tribunal erroneously reduced the penalty while deciding Issue No.4 ignoring the position that the penalty which was already reduced and quantified at Rs.2,62 crores. The Arbitral Tribunal has further reduced the sum to only Rs.14,00,000/- relying upon Note to Clause-5.9 of the tender providing for maximum cap of 10% penalty on bill amount. That Arbitral

Tribunal erroneously interpreted the clause to mean that penalty can never exceed 10% of the bill in any situation. The interpretation does not arise from the words of clause. The interpretation is otherwise unjust as it would prohibit imposition of any penalty on any contractor who does not work at all and loses all linen, as the bill would be zero. Such interpretation would also render the provisions for performance of bank guarantee and security deposit otiose. Mr. Bubna would further submit that while deciding Issue No.6, the Arbitral Tribunal erroneously awarded amount of Rs.2.61 crores towards fixed cost compensation. Though the Arbitral Tribunal observed that the contract did not provide for fixed workload and that there was no breach of contract on the part of the Petitioner, it still proceeded to award compensation by relying on extraneous material on Railway Board Circular dated 3 July 2020. The Tribunal thus once again travelled beyond the covenants of the contract, which is impermissible.

6) Mr. Bubna would further submit that the impugned Award is patently illegal and perverse. That the same is rendered by ignoring the express contract clauses and by rewriting the contract executed between the parties. That Arbitral Tribunal being the creator of contract, could not have ignored the contractual terms and awarded claims contrary to the express covenants of the contract. He would accordingly pray for setting aside the impugned Award.

7) The Petition is opposed by Mr. Shaikh, the learned Senior Advocate appearing for the Respondent. He would submit that no ground is made out for setting aside the Award under Section 34 of the Arbitration Act. That the Arbitration Petition is filed as if it is an appeal against the Award. That interpretation of contractual terms made by the Arbitral Tribunal cannot be questioned under Section 34 Petition. That the

view taken by the Arbitral Tribunal is a plausible view. He would therefore submit that no case is made out for interference in the impugned Award which is passed by Arbitral Tribunal comprising of railway officials chosen by General Manager of Central Railways. Mr. Shaikh would further submit that no error can be traced in the findings recorded by Arbitral Tribunal with regard to impermissibility to recover 100% of costs of lost linen. That Arbitral Tribunal has rightly relied on Railway Board Circular of 2015 providing for rate of recovery of only 75% of last purchase rate. That this finding recorded after considering the relevant facts and evidence, cannot be subject matter of penalty under Section 34 of the Arbitration Act. That reliance on Railway Board's Circular dated 1 September 2015 was necessitated on account of absence of reliable information regarding residual life of the lost linen items. That 2015 Circular provides for a clear framework for determining recovery rates when age or residual life of the linen is unknown. That the Arbitral Tribunal has considered recovery at the rate of cost of new linen to be unreasonable and unfair and no interference is warranted in such plausible view.

8) Mr. Shaikh would further submit that the findings recorded by the Arbitral Tribunal on Issue No.2 relating to quantification of the lost items also do not warrant any interference in Section 34 Petition. In absence of concrete details and non-provision for a methodology of comprehensive periodical census of linen stock, the Arbitral Tribunal has applied 75% of the last purchase rate of linen to be fair and reasonable rate of recovery.

9) So far as the finding on Issue No.3 is concerned, Mr. Shaikh would submit that the Arbitral Tribunal has recorded detailed findings in respect of each of the items of unserviceable linen, excess weight of

bedsheets, excess load and claim against delay penalty. That only claim against delay penalty is accepted and delay penalty of Rs.5.33 crores is found to be erroneously levied and the net debit is restricted to only Rs.60,64,713/. He would further submit that the findings on Issue No.4 relating to reduction of penalty also do not warrant interference while entertaining Petition under Section 34 of the Arbitration Act.

10) Mr. Shaikh would further submit that the Arbitral Tribunal has rightly considered the provisions of Railway Board circulars dated 3 July 2020. That there was extraordinary situation on account of Covid-19 outbreak which need not be envisaged by any one while drafting the contract clauses. That therefore the Arbitral Tribunal has taken aid of Railway Board circular dated 3 July 2020 issued specially for the purpose of dealing with force majeure situation. That the Railway operations were shut and huge investment made by the Respondent was stuck not earning any revenue. Considering these special circumstances, the Arbitral Tribunal has taken a plausible view in awarding fixed cost compensation to the Respondent. That therefore no interference is warranted in the said findings of the Arbitral Tribunal.

11) Mr. Shaikh would accordingly submit that the Petitioner has failed to make out any of the enumerated grounds of challenge under Section 34 of the Arbitration Act. He would pray for dismissal of the Petition.

12) Rival contentions of the parties now fall for my consideration.

13) Respondent is a laundry operator appointed by Central Railways, which decided to set up and operate a mechanized laundry in

railway premises in Mumbai at Wadibundar Depot. The Project was to operate on BOOT model and the operations were finally to be transferred to Railways at the end of the contract tenure of 15 years. The BOOT model contract was in the nature of private ownership by inducting private investment as it reduced the requirement of capital expenditure for Railways.

14) The Respondent was awarded contract of setting up and operating a dedicated mechanized laundry for a period of 15 years. The scope of work included collection and transportation of soiled linen from coaches and trains and transportation and loading of washed and packed linens in coaches/trains at CSMT, LTT and DT. The contract also included supply and installation of plant, equipment and related infrastructure. The contract value was Rs.79,94,45,813/- over a period of 15 years.

15) After disputes arose between the Petitioner and the Respondent, the claim was filed before the Arbitral Tribunal by the Respondent for an amount of Rs.18,01,83,764/-. The bifurcation of the nine different claims raised by the Respondent is as under :-

Claim NO.	Description	Final Claim (Rs.)
1.	Loss of linen. (for the period from 2013 to 26.05.2022)	1,20,45,126
2.	Delay Penalty (wrongly carried forward quantity after declaration of linen loss by Claimant) period from October 2013 to March 22, 2020.	7,34,18,884
3.	Penalty claimed over and above the ceiling of 10% as per tender, disputed by A -1 Laundry from April 2013.	2,62,80,365
4.	Various Penalties (a) Unsatisfactory washing and ironing	1,30,61,067

	(b) Torn Linen mixed with good linen (c) Gazetted Officials inspection (d) Passenger Complaints (e) Paper packet not supplied	
5.	Fixed Cost	5,03,65,087
6.	Arrears of LTT outsourcing (period December 2017 to January 2020)	19,12,734
7.	Arrears of water charges	1,49,186
8.	Arrears of labour component	35,499
9.	Electricity charges	10,50,443
	TOTAL	17,83,18,391

16) After considering the pleadings raised by the parties, the Arbitral Tribunal framed following ten issues:-

(i) Whether recovery of the loss of linen can be done 100% of the value of the linen in contravention of the Circulars issued by the Ministry of Railways dated 02.03.2006 and 01.09.2015?

(ii) Whether the loss of linen quantity has been correctly quantified and whether the claim of Rs. 1,20,45,126 is valid?

(iii) Whether the delay penalty of Rs 7,34,18,884 is correctly imposed and the basis for its calculation?

(iv) Whether the Respondent has correctly imposed the penalty of Rs. 2,62,80,365 that exceeded 10% of the actual bill amount and whether the penalties can be carried forward in the next bill in contravention with clause 5.9.4 of the contract on this account ?

(v) Whether the various penalties amounting to Rs. 1,30,61,067 on account of unsatisfactory washing and ironing, torn Linen mixed with good linen, gazetted officials inspection, passenger complaints and paper packet not supplied have been correctly imposed?

(vi) Whether the Claimant is entitled for claim of Rs.5,03,65,087/- towards fixed cost incurred in laundry during Covid period from 22 .03. 2020 to 03.04.2022 and whether the Respondent correctly invoked force majeure clause?

(vii) Whether the Claimant is entitled for an award amount of Rs. 19,12,734/- for the period of December, 2017 to January. 2020 towards arrears of LTT Outsourcing along with interest thereon @ 18% p.a. from the date of withholding till refund?

(viii) Whether the Claimant is entitled for arrears of water charges of Rs.1,49,186/- for the period from December 2017 to December 2019?

(ix) Whether the Claimant is entitled for labour charges of Rs,35,499/-?

(x) Whether the Claimant established that they are entitled for Electricity charges of Rs 10,50,443 ?

17) Out of the total nine claims, the Arbitral Tribunal has declined four claims of the Respondent and has awarded the balance five claims. The summary of decision of claims as reflected in para-8.1 of the impugned Award is as under:-

Claim NO.	Description	Final Claim (Rs.)	Award (Rs.)
1.	Loss of linen	1,20,45,126	30,11,304
2.	Delay Penalty (wrongly carried forward quantity after declaration of linen loss by Claimant) period from October 2013 to March 22, 2020.	7,34,18,884	-60,64,713*
3.	Penalty claimed over and above the ceiling of 10% as per tender, disputed by A -1 Laundry from April 2013.	2,62,80,365	2,48,37,715#
4.	Various Penalties (a) Unsatisfactory washing and ironing (b) Torn Linen mixed with good linen (c) Gazetted Officials inspection (d) Passenger Complaints (e) Paper packet not supplied	1,30,61,067	NIL
5.	Fixed Cost compensation.	5,03,65,087	2,61,15,236
6.	Arrears of LTT outsourcing.	19,12,734	NIL
7.	Arrears of water charges	1,49,186	NIL
8.	Arrears of labour component	35,499	NIL
9.	Electricity charges	10,50,443	10,50,443
	TOTAL	17,83,18,391	4,89,49,985

Note: See pages 18-19. Part claim of Rs.5,33,49,734.00 is granted as a notional claim, but cannot be paid, since this delay penalty is yet to be levied, Respondent is furthermore, prohibited from levying this penalty in future. Therefore, Loss of linen penalty of Rs.75,07,363.00 is offset against the part claim granted of Rs.14,42,650.00, so net amount of award is (-) Rs.60,64,713.00.

See pages 21-22. Part claim of Rs.14,42,650.00 is deducted from Rs.2,62,80,365.00, so net amount of award is Rs.2,48,37,715.00, since the same has been accounted for. Further, Respondent is prohibited from levying penalty in excess of 10% of pending bills in future, including the amount of Rs 6.86 crore granted as a notional claim.

18) This is how the Arbitral Tribunal has accepted fully or partially five out of the nine claims and has awarded amount of Rs.4,89,49,985/- in favour of the Respondent. I now proceed to decide the correctness of award of each of the five claims by the Arbitral Tribunal.

CLAIM NO. 1: RATE OF RECOVERY OF LOST LINEN AND CORRECTNESS OF COMPUTATION OF LOST QUANTITY (Issue Nos. 1&2)

19) Claim No. 1 has been dealt with by the Arbitral Tribunal while answering Issue Nos. 1 and 2 relating to recovery of cost of lost linen @ 100% of the value of the linen contrary to the Circulars issued by the Ministry of Railways dated 02 March 2006 and 01 September 2015 and correct quantification of the lost linen.

20) It would be necessary to consider the contractual clauses dealing with recovery of cost of lost linen. Clause-4.9.5 of the contract deals with torn/stained linen and provided thus :-

4.9.5 Torn/stained Linen:

a. The contractor shall make efforts for segregating the torn / stained and otherwise unserviceable items of linen items while collecting the same for washing from SSE (Linen) CSTM, DR, LTT, WB. The contractor may note that in case they fail to segregate such torn/stained and otherwise unserviceable items of linen while collecting the same for washing and cleaning, the damage to these items of linen while being delivered after washing and cleaning may be attributed on their account and cost. for the same recovered from them. **Said recovery shall be made as per the cost of new items specified by Railways-at any given point of time.**

b. In case any item gets torn during washing, the same shall have to be separately packed and supplied back to the Railways. In no case should torn linen be mixed up with good, washed linen items since the same result in possibility of torn linen being supplied to passengers which may invite complaints from them. Penalty as per para 5.9(viii) below shall be imposed on the contractor in case torn linen is mixed with good washed linen by the contractor. No washing charges shall not be paid for torn linen.

(emphasis added)

21) Thus, under Clause-4.9.5, it was the responsibility of the Contractor to segregate the torn/stained or otherwise unserviceable items of linen while collecting the same for washing. In the event, Contractor failed to segregate such torn/stained or otherwise unserviceable items of linen while collecting them for washing/cleaning, the damage to those items of linen while being delivered after washing and cleaning was attributed to Contractor's account and costs of the same was to be recovered from the Contractor. Under Clause-4.9.5, the recovery was agreed to be made as per cost of new items specified by Railways at any given point of time.

22) Clause-4.12 of the Contract dealt with accountal of linen and provided thus :-

4.12 Accountal of linen:

The contractor shall maintain computerized records pertaining to accountal of linen and other relevant details at each stage of work. The contractor may utilize RFID technology (by providing RFID tags on each item of linen) or similar technology for maintaining the history of utilization, life obtained, number of washes carried out and other relevant details for each item of linen. Such records shall have to be made available by the contractor to Railways whenever demanded.

23) Clause-5.9.(iv) provided that cost of the items lost or damaged while in contractor's custody which is attributed to contractor's account shall be recovered from the Contractor as per rates prevailing at that point of time. Clause-5.9.(iv) provides thus:-

iv. Cost of linen items lost or damaged while in contractor's custody which is attributed to their account may be recovered from the contractor as per rates prevailing at that point of time. Railways decision as to whether such loss or damage-is on contractor's account shall be final and binding on the contractor.

24) The Contractor disputed the recovery rate of lost linen provided for in Clause-4.9.5 of the Contract and claimed that the recovery needs to be done as per the circulars issued by the Railway Board providing for recovery of only 75% of last purchased rate of linen. Petitioner took a specific plea of non-applicability of Railway Board Circulars, which are not part of contractual conditions, by taking following stand:

Circulars regarding cost of recovery of lost linen are not a part of tender conditions, hence cannot be considered, as they have financial implications

25) In the light of these rival stands taken by the Petitioner and Respondent, the issue before the Arbitral Tribunal was whether to enforce contractual Clause-4.9.5 providing for recovery of cost of new linen or whether to apply Railway Board Circular providing for recovery of only 75% of the last purchased rate of linen. The Arbitral Tribunal has recorded following findings:-

7.1.3 Findings and conclusion of AT:

There are two circulars issued by the Railway Board in this matter. The first is of year 2006, which links the rate of recovery to residual life. The rates of recovery range from 100% to 40% of the purchase rate depending on the residual life, with 25% of the purchase rate for overaged items. The second circular of year 2015, links rate of recovery to residual life; in addition lays down recovery rate for linen where age is not known. This circular states that rate of recovery will be 100% of last purchase rate in the first half of codal life and 50% in the second half of codal life of lost linen; it will be 75% of last purchase rate if codal life is not known. These circulars are applicable for linen lost by Railways' staff as well as by contractors. Both these circulars are valid and applicable to the said matter as they are issued by the Railway Board. Both these circulars reflect the loss of value caused by routine wear and tear of linen items after repeated use.

Respondent has quoted clause 5.9(iv) of the contract which states that recovery for lost linen will be done at prevailing rates. The contract does not specify whether prevailing rates means current purchase rate, original purchase rate or depreciated rate reflective of wear and tear. The recovery has been done at 100% of current rates which is unfair and unreasonable, as it imposes the maximum cost on the Claimant and does not account for codal life and routine wear and tear, which would apply if recovery were to be made from Railways' staff/ contractor in terms of Board's instructions. AT therefore turns towards the Railway Board circulars mentioned above to give a fair estimate of value of lost linen.

There is no reliable information on residual life of linen items lost. Claimant was asked to specifically provide the same vide order sheet dated 4.1.24, item 4(ii). In the compliance application to order sheet dated 4.1.24 received on 16.1.24, item 2,3, Claimant admitted that such information was not available with them.

AT therefore is of the view that recovery at 100% of current cost is not in order, and takes recourse to Railway Board's circular of 2015, which states that in case life of linen is not known, rate of recovery will be 75% of last purchase rate.

(emphasis and underlining added)

26) The Arbitral Tribunal relied on Circular dated 2 March 2006 linking the rate of recovery to residual life of linen. It also took note of second Circular dated 1 September 2015 indicating the rate of recovery of residual life. The 2015 Circular provided that the rate of recovery would be 100% of lost recovery rate of last purchase rate in the first half of codal life and 50% of the second half of codal life of lost linen. The Circular provided that the rate of recovery would be 75% of last purchase rate if codal life is not known. The Arbitral Tribunal held that those Circulars issued by the Railway Board were applicable to the linen lost by railway staff, as well as by the Contractors. The Arbitral Tribunal thus faced a conflict between contractual Clause-4.9.5 providing for recovery rate of 100% of purchase cost of new linen as against Circulars of 2006 and 2015 providing for recovery of lesser rate of lost linen. The Arbitral Tribunal held that recovery done at 100% of current rates was '*unfair and unreasonable*'.

27) In my view, the Arbitral Tribunal has clearly travelled beyond the scope of contractual covenant in Clause-4.9.5. Once the Contractor agreed for recovery at the rate of cost of new items under Clause-4.9.5, it was impermissible for the Arbitral Tribunal to apply the test of '*fairness and reasonableness*' by travelling outside the scope of the contract. Once the contractual clause is clear and unambiguous requiring no interpretation, it was erroneous on the part of the Arbitral Tribunal to refer to Railway Board's Circulars of 2015 and 2006 for awarding the claim contrary to specific contractual clause-4.9.5. Here what is done by the Arbitral Tribunal is not interpretation of Clause-4.9.5. If the Tribunal was to merely interpret the clause, even erroneous interpretation would have passed the muster and error in interpretation would not have been a ground to set aside the award. However what the Arbitral Tribunal has done is to completely ignore Clause-4.9.5 and give supremacy to Railway Board Circular. This would clearly amount to rewriting the contractual clauses. The aspect of impermissibility for Arbitral Tribunal to award claims based on Railway Board Circulars contrary to contractual clauses is dealt with in greater details in the latter part of the judgment, while dealing with Claim No. 5. Suffice it to observe here that the Arbitral Tribunal being a creature under the contract, did not have jurisdiction to travel beyond its terms and award claims based on principles of fairness or reasonableness.

28) Also, parties had not agreed that the Arbitral Tribunal could decide the dispute by applying the principles of fair play or equity (*ex aequo et bono* or *as amiable compositeur*) under Section 28(2) of the Arbitration Act, which provides thus:

(2) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

The Arbitral Tribunal therefore could not have invoked the principles of 'fairness or reasonableness' by exercising jurisdiction in equity.

29) In my view therefore, award of Claim-1 by fixing recovery rate at 75% of last purchase rate is contrary to specific contractual Clause-4.9.5 and warrants interference in the impugned Award in exercise of power under Section 34 of the Arbitration Act. Therefore, award of Claim No.1 in the sum of Rs.30,11,304/- is clearly erroneous and liable to be set aside. So far as the quantity of lost linen is concerned, the Arbitral Tribunal has held that there is no dispute about quantity of lost items. The Arbitral Tribunal has accordingly modified only the rate of recovery of lost items at 75% while awarding the sum of Rs.30,11,304/- in Claim No.1. Award of Claim No. 1 therefore deserves to be set aside.

CLAIM-2 – DELAY PENALTY (Issue No.3)

30) The Arbitral Tribunal has considered the imposition of delay penalty of Rs.7,34,18,884/- into four parts of (i) unserviceable linen (ii) excess weight of bedsheets, (iii) excess load > 12 tones and (iv) claim against delay penalty.

31) The claims in respect of unserviceable linen, excess weight of bedsheets and excess load above > 12 tones have been rejected. The Arbitral Tribunal has only awarded fourth part of the claim viz. '*claim against delay penalty*'. The delay penalty for 990 days of Rs.5,33,49,734/- was sought to be imposed under Clause-5.9(iii) of the contract, which provided thus:-

5.9 Penalty: Railway administration on may at its discretion impose the following penalties on the Contractor:

i. In the event of the mechanized laundry not being commissioned and made operational within a period of 5 months from the date of Letter of Acceptance, and the delay in on account of the contractor, penalty as per GCC pertaining to Commencement of work and Liquidated Damages shall be recovered from the contractor. The decision of the Railway Administration as to whether such delay is on account of tenderer shall be final and binding and the contractor would have no claim in this. regard.

ii. Tenderers may note that the rates of penalties mentioned below shall be increased by the same factor as the overall price variation as per para 5.9 above

iii. **In the event of late delivery of articles of linen beyond the prescribed- period of two days, penalty @ Rs. 0.50/- per article of linen per day may be imposed on the contractor.** The period allowed to the contractor for transportation, washing and supply of linen shall be 2 days (excluding the day of issue of soiled linen to the contractor for washing and cleaning, but including the day on which the linen duly cleaned and washed is supplied to Railways). For example, Linen given to the Contractor for washing and cleaning on the 5 day of any month shall have to be returned to Railways duly washed and cleaned latest by 7 day of the month. Therefore, the allowed holding of linen items with the contractor at any time, for the purpose of calculation of penalty of excess holding called Delay charges, shall be the actual quantity of. the total of all the articles of linen given to the contractor for washing and cleaning during the period of 2 days (i.e. current and one previous days). The quantity of linen articles in the holding with the contractor, which is in excess of the allowed quantity as mentioned above shall attract penalty called Delay charges. The penalty of Delay charges shall be calculated on a daily basis. No. credit shall be given in case of the contractor supplying linen earlier than the allowed period.

iv. Cost of linen items lost or damaged while in contractor's custody which is attributed to their account may be recovered from the contractor as per rates prevailing at that point of time. Railways decision as to whether such loss or damage is on contractor's account shall be final and binding on the contractor.

v. In the event, if during checks by Gazetted Railway Officers or Passenger Complaints, it is detected that the quality of washing, cleaning or ironing of linen is unsatisfactory, a penalty of Rs.2,000/- per occasion can be imposed on the contractor. In addition, compensations awarded to the complainant(s) in any court of law or consumer forum which is attributable to the work carried out by the contractor under this contract agreement may be recovered from the contractor at the discretion of Railways. The decision of the Railway administration in this regard shall be final and binding on the contractor.

vi. Railway's authorized representatives shall randomly inspect a minimum of 100 articles of linen washed every day. If during random sampling check by the authorized Railway representatives, it is detected that the quality of

washing I ironing of the same is not satisfactory, then a penalty of Rs.3/- per article of linen may be imposed on the contractor apart from non payment of the washing charges. Further in the event of rejection of more than 2% on account of poor washing/ironing, the quantity of that particular lot of linen may have to be washed again (for which no additional payment shall be made).

vii. In the event of packaging of linen as specified is not done by the contractor's staff, a penalty of Rs. 0.50 per packet may be imposed on the contractor.

viii. If during sample checks by authorized Railway representatives, it is detected that torn linen is mixed up with good linen, then a fine of Rs.50/- per article of linen may be levied on the contractor. The contractor may note that mixing of torn linen with good washed linen may result in torn linen supplied to passengers which may invite complaints from them and shall be viewed very seriously by the Railway administration.

ix. In the event of the soiled linen not being unloaded from the incoming trains and cleaned and washed linen not being loaded in the outgoing trains within the prescribed time, or as specified by SSE (Linen) CSTM, WB, MZN, DR and LTT or their authorized representative, on account of presence of less than then required manpower or any other reason attributable to the contractor, penalty of Rs, 2,000/- per occasion may be imposed on the contractor. Tenderer(s) may note that such instances may lead to late and shall be viewed very seriously by the Railway administration. Tenderer(s) may note that normally both incoming and outgoing trains are stable on the platforms for 20 to 30 minutes. However, the trains may be stabled on the platform for lesser duration in order to maintain their punctuality of for any other reason, in which case the contractor is to make adequate arrangement for unloading and loading of linen within the time available.

x. Penalty up to a maximum of Rs.2.000/- per occasion may be imposed on the contractor by Gazetted Railway officers, in case any of the other contractual conditions are not adhered to by the contractor, for example, in the event of linen not transported in good quality water proof bags, contractor's staff not wearing uniform, etc.

xi. The amount of penalty shall be deducted from the pending bills submitted by the contractor for the work done, before passing the bills for payment.
Note: Penalty imposed on the tenderer in any bill shall not exceed 10% of the actual bill amount.

(emphasis added)

32) The Railways have already recovered the value of lost linen from the Respondents and additionally imposed penalty at the rate of Rs.0.50/- per piece of linen per day for 990 days. Both cannot be done. The Arbitral Tribunal has rightly set aside this penalty by holding as under:

- 1) 88342 items, amount Rs.1,00,09,817.00, loss of linen declared by Railways, but not accepted by Claimant, hence not adjusted and as a consequence contributed to delay penalty for 990 days and counting which is yet to be imposed and deducted, current amount Rs.5,33,49,734.00 ($88342 \times 0.61 \times 990$). Contractually, Respondent should have recovered the value of lost linen from the Claimant and reduced the quantity from the delay penalty. They failed to do so, thereby letting it attract a delay penalty for 990 days. The amount for lost linen reckoned as per 2015 Railway Board circular for linen items where age is not known, is @ 75% of last purchase rate, hence $\text{Rs } 1009817 \times 0.75 = \text{Rs } 75,07,363.00$ is to be recovered from the Claimant. Since delay is not on account of Claimant and has occurred due to non-accountal of declared lost linen, **delay penalty of Rs.5,33,49,734.00 cannot be rightfully imposed.** Since this delay penalty has not been levied, it cannot be paid, it is only a notional claim granted. **In case Respondent decides to impose this penalty in future, they are prohibited from doing so.** Meanwhile, Rs. 75 lakhs is debited for loss of linen. So the net result is a debit of Rs.75 lakhs. Hence, **amount of Rs 5,33,49,734.00 is to the notional credit of Claimant as claim for delay penalty and amount of Rs.75,07,363.00 to be recovered for lost linen as debit from them. Hence, net Claim is a debit of Rs.75,07,363.00.**
- 2) 40000 items, loss declared by Claimant, vide letter dated 20.11.2017 on page 576 of Claimant's main documents, not adjusted till February, 2018 and kept compounding for 101 days, current amount Rs 24,64,400. In this case, Respondent has pointed out in the reply to additional documents filed by Claimant, dated 18.11.2023, through items 12 to 16, on page 7-11, that the said letter dated 20.11.2017 was received only on 23.03.2018, so there was no deduction from total quantity in December 2017, as claimed by Claimant, but in March 2018. It is clear that delay penalty was levied due to late receipt of Claimant's letter informing Respondent of lost linen, the same also verified by AT since letter at page 576 of Claimant's documents has date stamp of 23.03.2018 received by Respondent, hence in this case Claimant is responsible for the delay and **the Claim is denied.**
- 3) 5500 items, loss declared by Claimant, vide letter dated 24.01.2020 on page 10,11 of additional documents volume 11, amount Rs 290325, not adjusted and kept compounding for 430 days, current amount Rs 14,42,650. In this case, Respondent has in the reply to additional documents filed by Claimant, dated 18.11.2023, stated that Claimant's letter dated 24.01.2020 declaring loss of linen was received and on 01.02.2020, 5500 is added to the quantity washed ($42117+5500=47617$). Lost linen declared by the Claimant has been reduced from the statement of delay charges, hence no delay penalty charges have been levied. This is clearly not the case, as Claimant has pointed out at page 5 of additional documents Volume II dated 29.10.2023, that the said quantity incurred a delay penalty of Rs 14,42,650 for a period of 430 days ($5500 \times 0.61 \times 430$) and the same has not been challenged by the Respondent. AT is of the view that Claimant is clearly not responsible for levy of the delay penalty in this case, having informed Railways of the loss of linen. Respondent

should have deducted the said quantity from the statement of delay charges, but have not done so. Hence, **Claim of Rs.14,42,650 is granted.**

- 4) Difference amount to be paid for increased weight of bedsheets, from 400 to 445 gms, on pages 29-65 of additional documents volume 11, of Claimant, amount Rs 1,61,62,100. This **Claim is denied** for reasons mentioned at item ii) above.

The total for the above Claims granted is net debit of Rs.60,64,713.00 (14,42,650.00 - 75,07,363.00), and Respondent are prohibited from imposing the consequent delay penalty of Rs.5,33,49,734.00.

33) However, while deciding this claim again, the Tribunal has applied 75% rate by relying on Circular of 2015, which is impermissible for the reasons indicated above. Therefore, the cost of 88342 quantity of lost linen needs to be Rs.1,00,09,817.00 and not Rs.75,07,363. After adjusting the amount of Rs.14,42,650 awarded under point No.3 above, the net debit would be Rs.1,00,09,817.00 less Rs.14,42,650 = Rs.85,67,167. The Petitioner however shall stand prohibited from imposing the consequent delay penalty of Rs.5,33,49,734.00, which part of the Award is confirmed.

CLAIM -3 PERMISSIBILITY TO LEVY PENALTY IN EXCESS OF 10% AS PER TENDER (Issue No. 4)

34) Petitioner had imposed the penalty of Rs.2,62,80,365.00 which had exceeded 10% of the actual bill amount and the penalties were carried forward in the next bill.

35) The Arbitral Tribunal has held as under:

The Claim is justified. **The contract unequivocally states that the penalty imposed in any bill shall not exceed 10% of actual bill amount.** An amount of Rs.14,42,650.00 (from issue no.3 delay penalty, item 3) on page 28 is to be adjusted against the amount granted under penalty exceeding 10%, as the said penalty has already been recovered and accepted to be returned as part of separate claim, and that this recovery is part of the amount of

Rs.2,62,80,365.00. Respondents are also prohibited from making future recovery of Rs 6.86 crore on the same grounds.

Hence the net amount of Claim granted under this head is Rs.2,48,37,715.00 (2,62,80,365 - 14,42,650).

36) The Note below Clause-5.9 provided as under :-

The penalty imposed on the tenderer in any bill shall not exceed 10% of actual bill amount.

37) The Arbitral Tribunal has rightly applied the above agreed contractual clause by capping the penalty at 10%. The award of Claim No.3 and answering of Issue No.4 is thus within the four corners of agreed contractual terms and I do not find any reason to warrant interference in the said findings.

CLAIM NO. 5: FIXED COST COMPENSATION (Issue no.6)

38) This claim arose on account of COVID-19 restrictions resulting in halt of railway operations and the plant and machinery of the Respondent lying idle. The operation of laundry was suspended and apparently started only in July 2022. Respondent therefore raised claim for fixed cost compensation during the period when the laundry was required to kept inoperational due to COVID-19 restrictions. The Arbitral Tribunal has partially awarded the claim to the extent of Rs.2,61,15,236/- by recording following findings :-

The said contract was for setting up and operating a mechanised laundry incorporating the new tunnel washer technology at Wadi Bunder on Central Railways, of which at that time there were only two in India; this was envisaged as a showcase project. The 'build own operate transfer' or BOOT model contract entailed eventual transfer of ownership to Railways at the end of the contract in 15 years. The BOOT model contract was in the nature of a public private partnership; by inducting private investment it reduced the requirement of capex on behalf of the Railways. As such, the contractor was a partner, having committed a large amount of capital for the long term for the exclusive use of Railways. The contract required heavy investment of Rs 10 crores as per Claimant's submission above.

The contract required that the contractor set up and operate a mechanised laundry of a minimum capacity of 6T per shift, and a workload of 12T per day, in return the contractor would be paid at the month end. Thus there was a reciprocal obligation from both sides. The payment was linked to the quantity of work and as correctly pointed out by the Respondent above, there was no proviso into pay for fixed cost, maintenance cost and depreciation. When the covid pandemic struck, it created an unforeseen situation where there was a sudden and abrupt stoppage of work, since no laundry was being loaded on trains. Thus, the contractor did not receive any payment since there was no workload. The contract as correctly pointed out by the Respondent, did not provide for assured workload, hence did not provide for any payment. In this respect it was unresponsive to dealing with unforeseen situations like the covid pandemic, which involved the sudden stoppage of work. It is understood that this aspect was rectified in later contracts. Thus though there was no breach of contract, there was a semblance of breach, since the work stoppage led to stoppage of all compensation to the contractor.

The Railway Board issued a circular dated 03.07.2020, to cover precisely such a situation, which enabled the payment of compensation for fixed cost and wages in contracts of mechanised laundry where there was no assured offtake clause. The method prescribed to do this was to pay compensation at the rate of the PVC clause in the contract. The said letter used the words "payments can be considered" "keeping in mind the unique conditions of each contract". The Respondent in this case, chose not to comply with the above circular for payment of fixed cost citing the contractual conditions which specifically prohibited payment for fixed cost though payment for wages were compensated in terms of another similar circular.

A corollary to the main issue of payment for fixed cost is the matter of invocation of force majeure clause. This was done by Respondent vide letter dated 01.03.2021, though trains were stopped following the covid lockdown on 22.03.2020, i.e. almost a year after the event. Moreover, the said letter did so with retrospective effect, which is not valid legally. Hence this is a non-issue which is not legally valid, nor is it relevant, since it does not affect the main point under discussion, which is the matter of compensation.

In view of the foregoing, **the Claimant is entitled to compensation in terms of Railway Board's circular dated 03.07.2020 above.** The PVC clause in the contract provides for @ 42% as Fixed Cost. The lock down took place wef 23.03.2020. The Claimant was asked to reopen the laundry wef 06.04.2022 vide Respondent's letter dated 29.03.2022 (Page 775 of SOC). Normalization of linen service took place wef July'22. Thus the claim on this account for about twenty eight months of non-operation of laundry.

The contract was awarded for 15 years with a capacity of 6T per shift i.e. 12T per day for a total amount of Rs.79,94,45,813.00. Linking compensation for 6T capacity is therefore considered reasonable by AT as that is the capacity installed by the Claimant and therefore contributing towards the fixed cost. Accordingly, the due compensation for 6T capacity works out to $(799445813 \times 42\% / 15 \text{ years} / 12 \text{ months} / 2 \text{ shifts} =)$ Rs.9,32,687.00 per month. Since the resumption of normal operations took

28 months, total compensation works out to Rs.2,61,15,236.00 (Rs.9,32,687.00 X 28). The Claimant had claimed Rs.5.22 Crores.

Therefore, the **Claim of Rs.2,61,15,236.00 is awarded**

39) I find Award of this claim to be contrary to the express covenants of the contract. The Arbitral Tribunal has noted the fact that there is no contractual clause providing for payment of any fixed cost to the Respondent during the period when laundry was to remain inoperational. The Arbitral Tribunal held that the contract did not provide for assured workload nor provided for any fixed payment. It is held that the contract did not deal with any unforeseen situation like COVID-19 pandemic. The Arbitral Tribunal accordingly concluded that there was no breach of contract by the Petitioner on account of non-providing of work during the lockdown period.

40) However, despite noticing absence of any contractual clause for payment of fixed compensation, the Arbitral Tribunal still proceeded to award the same by relying on Railway Board Circular dated the 3 July 2020. Here again, the Arbitral Tribunal travelled beyond the express covenants of the contract and took aid of extraneous material for awarding the claim. The contract was for a long period of 15 years and consciously did not make any provision for payment of compensation for fixed costs. The Railway Board Circular issued on 3 July 2020 could not be treated as part of the contract or it constitutes novation or variation of terms of contract. There is nothing in the contract to indicate that any subsequent changes effected by Railway Board Circulars were to be given effect as covenants of contract. There is no provision in the contract for alteration of terms of contract based on subsequently issued Railway Board Circulars.

41) In my view therefore, the Arbitral Tribunal could not have travelled beyond the express terms of contract and taken aid of Railway Board Circular dated 3 July 2020. Award of this claim is thus clearly erroneous and liable to be set aside. It is settled principle that the Arbitrator cannot, under the guise of interpretation of contract, rewrite the terms thereof or create a new contract. In para 83 of the judgment in *PSA Sical Terminals Private Limited Versus Board of Trustees of V.O.Chidambram Port Trust Tuticorin And Another*¹, the Apex court has held in para 83 to 88 as under :-

83. However, ignoring the stand of TPT, by the impugned award, the Arbitral Tribunal has thrust upon a new term in the agreement between the parties against the wishes of TPT. The “royalty payment method” has been totally substituted by the Arbitral Tribunal, with the “revenue-sharing method”. It is thus clear, that the award has created a new contract for the parties by unilateral intention of Sical as against the intention of TPT.

84. After referring to various international treaties on arbitration and judgments of other jurisdictions, this Court in *Ssangyong Engg. & Construction Co. Ltd.*, observed thus : (SCC pp. 199-200, para 76)

“76. However, when it comes to the public policy of India, argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the circular does not and cannot apply. **This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral circular and by substituting a workable formula under the agreement by another formula de hors the agreement.** This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to

1 (2023) 15 SCC 781

the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.”

85. As such, as held by this Court in *Ssangyong Engg. & Construction Co. Ltd.*, the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. **This Court has further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, rewriting a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the court and as such, would fall in the exceptional category.**

86. We may gainfully refer to the following observations of this Court in *Bharat Coking Coal Ltd. v. Annapurna Construction*

“22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.”

87. It has been held that the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction.

89. It has been held that an Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its powers *ex debito justitiae*. It has been held that the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.

88. It will also be apposite to refer to the following observations of this Court in *Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.* :

“43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power *ex debito justitiae*. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.”

(emphasis added)

42) In Indian Oil Corporation Limited Versus. Shree Ganesh Petroleum Rajgurunagar². The Apex Court has restated the settled principle the the role of Arbitrator is to arbitrate within the terms of the contract and if he travels beyond the contract he would be acting without jurisdiction. The Apex Court has held in paras. 50 to 53 as under:-

50. In PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors. this Court referred to and relied upon SSangyong Engineering and Construction Co. Limited (supra) and held:

“85. As such, as held by this Court in Ssangyong Engineering and Construction Co. Limited (supra), the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the Agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, 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.”

51. In PSA SICAL Terminals Pvt. Ltd. (supra) this Court clearly held that the role of the Arbitrator was to arbitrate within the terms of the contract. He had no power apart from what the parties had given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction.

52. In PSA SICAL Terminals Pvt. Ltd. (supra) this Court referred to and relied upon the earlier judgment of this Court in MD. Army Welfare Housing Organization v. Sumangal Service (P) Ltd. : (2004) 9 SCC 619 and held that an **Arbitral Tribunal is not a court of law**. It cannot exercise its power ex debito justitiae.

53. In Satyanarayana Construction Co. v. Union of India and Ors : (2011) 15 SCC 101, a Bench of this **Court of coordinate strength held that once a rate had been fixed in a contract, it was not open to the Arbitrator to rewrite the terms of the contract and award a higher rate**. Where an Arbitrator had in effect rewritten the contract and awarded a rate, higher than that agreed in the contract, the High Court was held not to commit any error in setting aside the award

(emphasis added)

43) The issue of introducing fresh terms in the contract based on provisions of Railway Board Circular was involved in recent judgment of

2 (2022) 4 SCC 463

the Apex Court in *Indian Railways Catering And Tourism Corp. Ltd. Versus. Brandavan Food Products*³. In case before the Apex Court, tender was issued for providing catering services on trains. The tariff/apportionment of charges for each services was prescribed in tender notice on the basis of commercial circular issued by Railway Board. Before opening the bids pursuant to the tender notice, Railway Board issued a new Commercial Circular dated 9 October 2013 increasing the tariff and introducing the concept of combo-meal. The Respondent before the Apex Court was the successful bidder with whom master license agreement was executed. During currency of contract, Railway Board announced a New Catering Policy on 27 February 2017 under which management of catering services was directed to be provided by IRCTC in place of Zonal Railways. Accordingly, Tripartite Agreement dated 10 August 2017 was issued by Northern Railways, IRCTC and Brandavan Food Products. Railway Board issued circular dated 3 October 2019 for reimbursement of catering charges to the service provider at the rate of regular meal tariff in place of combo meal tariff and the contractors were required to serve regular meal twice instead of supplying combo meal. The caterers were paid for second regular meal only on price of combo-meal as per Commercial Circular dated 23 October 2013. Another grievance was with regard to the supply of welcome drinks which was a concept issued by Commercial Circular dated 6 August 2014, but caterers were not paid for serving welcome drinks. In arbitration initiated at the instance of Brandavan Food Products, the Arbitral Tribunal awarded claim for second regular meal and also welcome drinks. Learned Single Judge of the Delhi High Court held that the caterer was not entitled to seek reimbursement for serving second meal having entered into contract which permitted IRCTC to change the menu and tariff unilaterally. The Division Bench set aside the order of the learned

3 (2025) SCC Online SC 2369

Single Judge and upheld the Award *qua* the claim for second regular meal and welcome drink. Only the award pertaining to interest was set aside by the Division Bench. Before the Apex Court, IRCTC contended that the contractor was bound by the terms of contract. The Apex Court has upheld the case of IRCTC and has held that the learned Arbitrator erred in assuming that he was only interpreting the terms and conditions. It is held that the Arbitrator did not have the liberty to place a contrary construction on the express language used in the contract. The Apex Court held that Section 28(3) of the Arbitration Act mandatorily required the learned Arbitrator to take into account the terms of contract and trade usages available to the transaction in which that case were the policy decisions of Railway Board. The Apex Court further held that the Arbitrator was bound to consider such policy decisions and evaluate the contractual terms in the context thereof. The Apex Court therefore ruled that the caterers were not entitled to seek parity of tariff/apportionment charges for the second regular meal on par with the one payable for first regular meal, nor reimbursement for welcome drink based on subsequently issued Circulars. The Apex Court held in paras-62, 63, 68 and 69 as under :-

62. Given these facts, we have to examine whether the hermeneutical exercise undertaken by the Arbitrator, culminating in the Award dated 27.04.2022, warrants interference. It is now well settled that Section 34 of the Act of 1996 provides limited grounds on which an arbitral award can be set aside. Section 34(1) makes it clear that recourse to a Court against an award may be made only by an application to set it aside in accordance with sub-sections (2) and (3) thereof. Section 34(2) details the grounds on which an award may be set aside. For the purposes of this adjudication, Section 34(2A) is also relevant. This provision was inserted retrospective effect from 23.10.2015, with vide Amendment Act No. 3 of 2016. It states to the effect that a domestic arbitral award may be set aside if the Court finds that the said award is vitiated by patent illegality appearing on the face of that award. The proviso thereto, however, adds a caveat that an award should not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

63. Pertinently, Section 34(2)(b)(ii) provides that if the Court finds that an arbitral award is in conflict with the public policy of India, the Court would be justified in setting it aside. Explanation 1, as it presently reads, and

Explanation 2 were inserted by the Amendment Act No. 3 of 2016 with retrospective effect from 23.10.2015. Explanation 1 provides that, for the avoidance of doubt, it is clarified that an award is in conflict with the public policy of India only if its making was induced or affected by fraud or corruption or was in violation of Sections 75 or 81 of the Act of 1996 or it is in contravention with the fundamental policy of Indian law or it is in conflict with the most basic notions of morality or justice. Explanation 2 provides that, for the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

68. Given the settled legal position emerging from the above referred decisions, it is manifest that the Arbitrator erred in assuming that he was only interpreting the terms and conditions of the contracts/MLAs and was, therefore, at liberty to place a contrary construction on the express language used therein, which was actually reflective of the policy decisions of the Railway Board, Ministry of Railways, Government of India, in its circulars referred to supra. Merely because there was a subsequent change in the policy with prospective effect, based on the recommendations made by the IRCTC itself, whereby parity was brought about in the tariffs to be paid to the caterers for the first and the second regular meals, it did not have the effect of wiping out the policy decisions set out in Commercial Circulars No. 67 of 2013 and 32 of 2014, during the period that they continued to hold sway and were in operation.

69. In its wisdom, having chosen to challenge the aforesaid circulars, BFP did not carry it forward after the dismissal of its writ petition and, in consequence, BFP and the other caterers can raise no objection at this stage to the policy decisions embodied in those circulars which were merely replicated and applied in their contracts/MLAs. Once the contracts between the parties were strictly in terms of and in keeping with the extant policy, the terms of such contracts could not have been interpreted by the Arbitrator contrary to and in violation of the policy, which remained intact after the dismissal of BFP's writ petition. **The Arbitrator was, therefore, not justified in undertaking interpretation of the contractual terms contrary to language used therein, which merely mirrored the policy decisions of the Railway Board which were binding in nature. In effect, the Arbitrator practically rewrote the contract between the parties in such a manner that it was in contradiction with the policy decisions set out in the Circulars dated 23.10.2013 and 06.08.2014, which he could not have touched.** In the light of the judgments referred to supra, this error on the part of the Arbitrator resulted in the Award not only being against the public policy of India but also made it patently illegal. Section 28(3) of the Act of 1996 mandatorily required the Arbitrator, while deciding and making the Award, to take into account the terms of the contract and the trade usages applicable to the transaction. The trade usages in this regard were the policy decisions of the Railway Board, Ministry of Railways, Government of India, that governed contracts of this nature. Therefore, the Arbitrator was bound to consider such policy decisions in that light and evaluate the contractual terms in the context thereof. In the present case, the Arbitrator completely overlooked the weightage to be given to the policy decisions embodied in the Railway Board's circulars and compounded the error by contrarily interpreting the

contractual terms, which were strictly in consonance therewith, to grant relief to the caterers.

(emphasis and underlining added)

44) In my view, the judgment of the Apex Court in *Brandavan Food Products* (supra) completely answers the issue involved in the present case. In the present case also, the Arbitral Tribunal has rewritten the terms of contract. The ratio of the judgment in *Brandavan Food Products* cannot be read to mean that Railway Board Circulars need to be given effect to in arbitral proceedings. In that case, the contractual clauses were found to be in tune with earlier Circulars and even though the subsequent Circulars provided for higher payments to the railway catering contractors, the Apex Court has ruled by referring to provisions of Section 28(3) of the Arbitration Act that the claims could not have been awarded contrary to express contractual clauses. In the present case, the Arbitral Tribunal has ignored the contractual clauses and has awarded claims by relying on Railway Board Circulars.

45) The Arbitral Tribunal has clearly rewritten the express terms of contract in relation to Claim No.1 relating to rates of lost linen and Claim No.5 relating to fixed cost compensation. The Arbitral Tribunal foisted a new bargain on parties which they had never agreed upon. The Arbitral Tribunal has acted as if it was a Court of law while applying the principles of unfairness and reasonableness. Being a creature of contract, its hands were bound by contractual terms. The award of Claim Nos. 1, 2 (part) and 5 thus suffer from the vice of patent illegality. Award of Claim No.5 therefore needs to be set aside.

CLAIM NO. 9 ELECTRICITY CHARGES

46) No submissions are canvassed about award of Claim No. 9 and therefore it is not necessary discuss the findings recorded by the arbitral tribunal. Award of the Claim is accordingly upheld.

SEVERANCE OF BAD PART OF AWARD FROM GOOD PART

47) The Constitution Bench in *Gayatri Balasamy Versus. ISG Novasoft Technologies Limited*⁴ has held that bad part of the Award can be severed from the good part. In the present case, bad part of the award falling foul of Section 34 is not inseparably intertwined with the good part of the award. Applying the said principle, the impugned Award deserves interference in exercise of power under Section 34 of the Arbitration Act to the extent where the Tribunal has travelled beyond the contractual terms while awarding Claims No.1 and partly Claim No. 2 (loss of linen), and Claim No.5 (fixed cost compensation) and the same needs to be confirmed *qua rest* of the claims.

ORDER

48) I accordingly proceed to pass the following order :-

- (i) The Award of the Arbitral Tribunal dated 7 March 2024 in respect of Claim No.1 (*loss of linen Rs.30,11,304*) and Claim No.5 (*fixed cost compensation of Rs.2,61,15,236*) is set aside. The amount of debit for loss of linen under Claim No. 2 shall be Rs. 85,67,167.

(ii) The Award of the Arbitral Tribunal dated 7 March 2024 is confirmed in respect of rest of the claims.

(iii) Accordingly the table at paragraph 8.1 of the Award shall stand substituted as under :-

Claim NO.	Description	Final Claim (Rs.)	Award (Rs.)
1.	Loss of linen	1,20,45,126	NIL
2.	Delay Penalty (wrongly carried forward quantity after declaration of linen loss by Claimant) period from October 2013 to March 22, 2020.	7,34,18,884	-85,67,167
3.	Penalty claimed over and above the ceiling of 10% as per tender, disputed by A -1 Laundry from April 2013.	2,62,80,365	2,48,37,715#
4.	Various Penalties (a) Unsatisfactory washing and ironing (b) Torn Linen mixed with good linen (c) Gazetted Officials inspection (d) Passenger Complaints (e) Paper packet not supplied	1,30,61,067	NIL
5.	Fixed Cost compensation.	5,03,65,087	NIL
6.	Arrears of LTT outsourcing.	19,12,734	NIL
7.	Arrears of water charges	1,49,186	NIL
8.	Arrears of labour component	35,499	NIL
9.	Electricity charges	10,50,443	10,50,443
	TOTAL	17,83,18,391	1,73,20,991

(iv) Consequently, Respondent shall be entitled to be paid by the Petitioner amount of Rs.1,73,20,991/- along with interest of 10 % from the date directed by the Arbitral Tribunal.

(v) Respondent shall be entitled to withdraw amount of Rs. 1,73,20,991/- with 10 % interest from the date indicated in

the award and the balance deposited amount together with accrued interest shall be refunded to the Petitioner

49) The Arbitral Petition is **partly allowed** to the above extent and disposed of. Considering the facts and circumstances of the case, I deem it appropriate not to award any costs in the Petition.

50) With dismissal of the Petition, nothing would survive in the Interim Applications and the same are accordingly disposed of.

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[SANDEEP V. MARNE, J.]