

Arb.O.P.(Com.Div) No.602 of 2023 etc

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.04.2025

Pronounced on : 09.04.2025

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

**Arb.O.P.(Com.Div.) Nos.602 of 2023, 74, 128, 423 to 429 of 2024,
and 92 & 172 of 2025**

Arb.O.P.(Com.Div.) No.602 of 2023

Union of India,
through PCMM, ICF &
Shri Nikil K.G., Dy CMM/Bogie/Shell/
Integral Coach Factory,
Chennai – 38.

.. Petitioner in Arb.O.P.(Com.Div.)No.602/23

vs.

M/s.Indra Industries,
Ranipet – 632403

.. Respondent in Arb.O.P.(Com.Div.)No.602/23

Prayer in Arb.O.P.(Com.Div.) No.602 of 2023: This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, seeking to set aside the Arbitral Award dated 08.08.2023 passed by the Arbitral Tribunal in respect of claim No.1 of the respondent in the matter of arbitration between the respondent and the petitioner.



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Arb.O.P.(Com.Div) No.602 of 2023 etc

For Petitioner in O.P Nos.602/23,

74, 423 to 429 of 2024,

and 92 & 172 of 2025

: Mr.AR.L.Sundaresan,
Additional Solicitor General
Assist. by Mr.A.R.Sakthivel, SPC
& S.Janarthanan, SPC

For Respondent

in 602/23 & 74/24

: Mr.Sandeep Sachdeva
Mr.Damodar Vaidya
Mr.Devang Bhasin

in 423 to 429 / 24

: Mr.Srinath Sridevan, SC
for Mr.Adithya Reddy
Mr.Ashwin Vaithiyalingam & Mr.Ranadhir

For petitioner

in O.P.No.128 of 2024

: Mr.R.Sudhinder
for Mr.Ashok Kumar

For Respondent in OP.No. 128/24

: Mr.AR.L.Sundaresan,
Additional Solicitor General
Assist. by Mr.A.R.Sakthivel, SPC

COMMON ORDER

These OPs have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short "the Act") challenging the respective arbitral awards. Excepting for O.P.No.128 of 2024, the other OPs have been filed by Integral Coach Factory (ICF), the respondent in the arbitration.

2. In O.P.No.128 of 2024, the petitioner therein, who was the claimant in the



arbitration, was unsuccessful in the arbitration, as their claim for enforcement of the statutory variation clause on account of non-release of 7% differential GST amount by the respondent subsequent to the revision of the rate of GST was rejected on the ground that the petitioner might have included 13% differential GST in their quoted price for getting the award in their favour. However, in the remaining OPs, namely, Arb.O.P.(Com.Div.) Nos.602 of 2023, 74, 423 to 429 of 2024 and 92 & 172 of 2025, the respondents in those OPs are the claimants in the arbitration. They also sought for release of 7% differential GST amount and sought for enforcement of the statutory variation clause in the contract. The Arbitral Tribunal, which had passed the respective arbitral awards in their favour, had held that the respondents, who are the claimants in those OPs, are entitled for release of 7% differential GST amount as per their arbitral claim.

3. Since the issue involved in all these OPs is one and the same, this Court is disposing of all the OPs by a common order. For the sake of convenience and clarity, in the forthcoming paragraphs, the petitioner/Integral Coach Factory will be referred to as “ICF” and the respondents will be referred to as contractors.

4. The dispute primarily concerns the interpretation of contractual clauses, which are identical in all the cases, and the application of GST law. The dispute



that arises for consideration in these OPs are;

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(a) whether any additional Input Tax Credit (ITC) benefit accrued to the contractors due to the GST rate increase, when there was no corresponding change in input tax regime, has not been passed on to ICF, the employer;

(b) whether the respective contractors were obligated to reduce prices under Clauses 2.8 and 2.9 of the General Conditions of the Contract (GCC) and Clause 3.0 of the respective Purchase Orders (POs).

(c) whether ICF (employer) was contractually bound to reimburse full GST amount in the light of statutory variation clause available under the respective POs.

5. While allowing the claims filed by the respective contractors in Arb.O.P.(Com.Div.) Nos.602 of 2023, 74, 423 to 429 of 2024 and 92 & 172 of 2025, the respective Arbitral Tribunals, which had passed the impugned arbitral awards, held that the statutory variation clause is applicable to the respective contractors and therefore, ICF was contractually bound to reimburse the full GST



amount in the light of the statutory variation clause. However, according to ICF, both before the Arbitral Tribunal and before this Court under Section 34 of the Act, they have relied upon Clauses 2.7, 2.8 and 2.9 of the GCC and they have submitted that since the respective contractors have agreed to pass on such additional input tax credit as may become available in future under GST scheme in respect of all the inputs used in the manufacturing and/or supply of the final goods and service on the date of supply by way of reduction in price, the respective contractors are not entitled for reimbursement of the full GST amount by applying the statutory variation clauses available in all the contracts. Therefore, a decision in all these OPs will depend upon the interpretation of the following clauses available in all the contracts, which were the subject matter of the dispute before the respective Arbitral Tribunals:-

“2.7 Any amendment in GST rate shall be governed by the contractual conditions under Statutory Variation Clause (SVC). However, increase in GST rate amendments shall be considered for quoted HSN only, against documentary evidence, provided such increase of GST rates takes place after the date of tender opening. The benefit of reduction in GST rate shall have to be passed on to railways.

2.8 While quoting the rates, the tenderer shall pass on, by way of reduction in prices, the full input tax credit that may become available in respect of all the inputs used in the supply



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of final goods/or services under GST scheme and submit a declaration in their offer of the same.

3.0 Statutory Variations:

3.1 Statutory variation will be considered during the original delivery period and against documentary evidence only. However increase in taxes or duties on account of misclassification or misapprehension of law shall not be allowed. Tenderers are thus advised to include Statutory Variations Clause correctly and explicitly in their offers.”

6. The respective Arbitral Tribunals which had passed the impugned arbitral awards in favour of the contractors had held that Clause 3.0 (statutory variation) of the GCC favours to the contractors for the following reasons:-

(a) Statutory variation clause applies to the contract, since ICF has never challenged its applicability in any proceedings including arbitration.

(b) ICF raised no objection regarding statutory variation clause during the arbitration.

(c) There was no change in the input tax rate or coverage under the GST law, negating any claim of ITC benefit accrual to the respective contractors.

7. The respective Arbitral Tribunals by applying the GST principles had held that availment and utilization of ITC are distinct under the GST law. It was



further held that Clauses 2.8 and 2.9 of the GCC read with Clause 3 of the respective POs, specify that only newly available ITC benefits must be passed on to ICF. The Arbitral Tribunal, while passing the arbitral awards in favour of the respective contractors, who are the claimants in the arbitration, had given the following reasons for coming to the conclusion that the respective contractors are entitled to apply statutory variation clause available in the contract for the purpose of seeking reimbursement of the full GST amount in the light of statutory variation clause.

- (a) Availment of ITC is governed by Sections 16 and 17 of the CGST Act.
- (b) Utilization is covered under Sections 49 and 49A of the CGST Act. The availment and utilization of ITC are two different concepts under the GST law and cannot be equated.
- (c) No time limit to utilize ITC, hence, ITC can never form part of the cost of the goods.
- (d) ITC is not to be treated as cost, and it is accounted as an asset in the books of account.
- (e) The respective contractors have submitted a certificate obtained from the Chartered Accountant to ICF at the time GST rate change, so as to enable them to get reimbursement of the full GST amount in the light of statutory variation clause on account of change in the GST rates from 5% to 12% subsequent to the date of



respective contracts.

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8. Before this Court, Mr.AR.L.Sundaresan, learned Additional Solicitor General, placed reliance on the Joint Procedure Order (JPO) No.1 of 2019, dated 30.09.2019, in support of ICF contention that since the additional ITC benefit accrued to the contractors due to increase in GST rate and that there was no corresponding change in the input tax regime, the respective contractors were obligated to reduce prices under Clauses 2.8 and 2.9 of the GCC read with Clause 3.0 of the respective POs. JPO No.1 of 2019 relied upon by the learned ASG is not a part of the contract and therefore, the respective contractors never contractually agreed to the same.

9. The respective Arbitral Tribunals, which had passed the impugned arbitral awards, in favour of the respective contractors, had also held based on the evidence available on record that no additional ITC benefit accrued to the respective contractors due to output GST rate increase. Therefore, the respective Arbitral Tribunals held that the claim of ICF that the respective contractors were obligated to reduce prices as per Clauses 2.8 and 2.9 of the GCC read with Clause 3 of the respective POs is misplaced and untenable. The respective Arbitral Tribunals had also taken note of the fact that ICF had fully honoured the arbitral



award in favour of M/s.Kineco Limited on the same issue by refunding the sum pertaining to withheld GST.

10. As per the GST scheme, the availability of ITC is always understood in the context of better availment of ITC and not better utilization of ITC. The availment and utilization constitute two different legs of ITC under the GST regime, which is evident from the following:

(a) Section 16 provides the conditions for availing ITC on procurement of inputs and input services.

(b) Section 17 provides for availability and non-availability of ITC under various circumstances.

(c) The concept of utilization under Sections 49 and 49A of the CGST Act.

(d) The clarification issued by the Government with respect to ITC mechanism.

11. The respective Arbitral Tribunals had correctly interpreted the scheme of GST law that availment and utilization of ITC represent two different and distinct concepts in GST regulations and rightly rejected the contention of ICF that “available” and “utilization” are not different and are used in an interchangeable manner. The said view taken by the respective Arbitral Tribunals for the above proposition is also fortified by the decision rendered by the Gujarat High Court in



Bhagwati Construction Vs. Union of India (A.No.15114 of 2021, dated

13.04.2022), which was subsequently followed by Guwahati High Court in case of

HCC-CPL(JV) Vs. Union of India and others [W.P.(C)No.2683 of 2023, dated

14.03.2023], which held that availment and utilization are two different concepts

under the GST law and the same cannot be equated. The respective Arbitral

Tribunals had also rightly interpreted that “benefit of ITC” would arise only due to

change in the ITC scheme, not on account of change in the output tax. By relying

upon various statutory provisions under the GST law, the respective Arbitral

Tribunals, while allowing the claim of the contractors, had held that benefit of ITC

under Clauses 2.8 and 2.9 of the GCC read with Clause 3 of the respective POs,

will accrue only on account of change in the ITC scheme and not on account of

change in output tax structure. Admittedly, in the case on hand, there was no

change in the ITC scheme either in terms of rate or in terms of coverage.

Therefore, the question of non-compliance with the conditions specified in

Clauses 2.8 and 2.9 of the GCC, which ICF relies upon before this Court, does not

arise.

12. The Arbitral Tribunals had further taken note of the fact that ITC is not to be treated as a cost and it is accounted as an asset in the books of account as laid down in the accounting standards and cost accounting standards. The



respective contractors had also filed a certificate obtained from the Chartered

Accountant before the Arbitral Tribunals, which were marked as exhibits, to prove

that the benefit of ITC never accrued to their favour on account of increase in

output GST rate with effect from 01.10.2009, when there was no change in the

input tax regime. To disprove the Chartered Accountant certificate filed by the

respective contractors before the respective Arbitral Tribunals, no iota of evidence

has been produced by ICF. The Chartered Accountant was also not summoned by

ICF for cross-examination. The respective Arbitral Tribunals had therefore

rightly interpreted that benefit of ITC would arise only if there is change in the

ITC scheme and not on account of change in output tax structure. A certificate

obtained from the Chartered Accountant also clarifies that accumulated ITC is not

forming part of bid price quoted by the respective contractors in the tender stage.

Only based on the evidence available on record, the respective Arbitral Tribunals

had come to the right conclusion that no accumulated ITC has been

factored/included in the basic price offered by the respective contractors to ICF,

while submitting their respective bids.

13. The entire case of ICF before the Arbitral Tribunals as well as before this Court is based on its internal JPO No.1/2019, dated 30.09.2019, which is not binding on the respective contractors as they are bound only by the respective



contracts signed by them. JPO No.1/2019 of ICF also reveals that there is a

possibility that the respective contractors may have gained additional ITC benefit

due to GST rate increase and even according to ICF, there has been no conclusive

proof for the purpose of proving that additional ITC benefit was in fact accrued to

the respective contractors due to GST rate increase from 5% to 12%. Only based

on speculation and presumption, which is not supported by any documentary

evidence, ICF has contended that additional ITC benefit has been accrued to the

respective contractors due to GST rate increase and therefore, the respective

contractors are obligated to reduce prices under Clauses 2.8 and 2.9 of the GCC

read with Clause 3 of the respective POs. The impugned arbitral awards passed by

the Arbitral Tribunals in favour of the respective contractors allowing their

respective arbitral claims by directing ICF to reimburse the full GST amount in the

light of statutory variation clause available in the respective contracts, are only in

accordance with the law and as per the contractual provisions, namely, statutory

variation clause found in Clause 3 of the POs, which are applicable for the

contractors. The only possible view that could have been taken by the Arbitral

Tribunals is that the respective contractors are entitled for reimbursement of the

full GST amount in the light of statutory variation clause, as no additional ITC

benefit accrued to them due to increase in the rate of GST from 5% to 12% as

there was no corresponding change in the input tax regime.



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14. Under Section 34 of the Act, only if the party satisfies the following, the arbitral award can be set aside by the Court:-

(a) Incapacity of a party while making an application to enter the agreement.

(b) Arbitration agreement not being valid under the law.

(c) Parties were not given proper notice of the appointed Arbitrator or the Arbitral Tribunal.

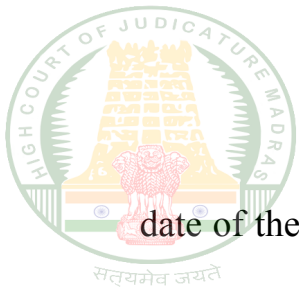
(d) Nature of the dispute not capable of settlement by arbitration.

(e) The composition of the arbitral tribunal was not in accordance with the agreement of the parties.

(f) The arbitral award is in violation of the public policy of the State.

(g) The arbitral award deals with a dispute not falling within the terms of submission to an arbitration.

15. In the case on hand, due to revision in the rate of GST subsequent to the



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date of the contract, the respective contractors have been compelled to enforce the statutory variation clause. They cannot be left high and dry for no fault of theirs, as it seen from the evidence available on record, they would not have factored unexpected revision in the rate of GST from 5% to 12% while they had quoted their price through their respective bids. The respective Arbitral Tribunals has rightly considered and passed the impugned arbitral awards in favour of the respective contractors. None of the grounds raised in these petitions fall within the parameters required for setting aside the arbitral awards insofar as the arbitral awards passed in favour of the respective contractors are concerned. Therefore, the arbitration OPs filed by ICF in Arb.O.P.(Com.Div.) Nos.602 of 2023, 74, 423 to 429 of 2024 and 92 & 172 of 2025, do not deserve any merit and there is no scope for interference by this Court under Section 34 of the Act. Unless and until the impugned arbitral awards passed in favour of the respective contractors suffer from perversity and are patently illegal and have been passed without any evidence and contrary to well settled law, the question of interference by this Court under Section 34 of the Act does not arise.

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16. In respect of one another claim made by another contractor before another Arbitral Tribunal involving a similar claim, the Arbitral Tribunal has



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however rejected the claim through its arbitral award dated 06.11.2023, which is the subject matter of Arb.O.P.No.128 of 2024.

17. The Arbitral Tribunal which had passed the arbitral award rejecting the claim of the aforesaid contractor had incorrectly held that Clauses 2.8 and 2.9 of the GCC would be applicable to the contractor. However, as seen from Clauses 2.8 and 2.9 of the GCC, extracted supra, the expression used is “while quoting the rates...” and “while quoting the tenders....”. Therefore, it is clear from the said clauses that it will not be applicable after the submission of the bids, more specifically, to any enhancement of taxes subsequently for which the contractors are protected through the statutory variation clause. Further, Clause 2.8 of the GCC can only apply if the tax credit was being factored as a part of the cost by the tenderer not being able to utilize the said credit for payment of output tax. Therefore, unless the credit is capable of being passed on as a cost, there cannot be a price reduction.

18. The Arbitral Tribunal had also completely misunderstood the scope of Clause 2.9 of the GCC. The expressions “additional input tax credit as may become available in the future....” reveals that if there was any additional input tax credit available, it is that credit which the contract mandates to pass on, provided it is again unabsorbed credit which cannot be utilized elsewhere. Further, if the ITC



does not form part of the cost, it would make no difference to the cost of final product and there would be no price reduction on the final product. The expressions quoted above would clearly show that there should be an 'additional input tax credit....'. It is an admitted fact that there was no variation in ITC. Therefore, there can be no question of any price variation. The variation in tax was only with respect to the final products (contract goods) from 5% to 12% and it was nobody's case that there was corresponding variation on the input tax which resulted in any additional tax benefit. Therefore, neither Clause 2.8, which contemplates 'input tax credit that may become available' nor clause 2.9 which refers to 'additional input tax credit' has happened in the facts of the present case. The variation was not in respect of inputs, but, in respect of final products. Therefore, neither of the said clauses are applicable to the case on hand.

19. Eventhough the Arbitral Tribunal which had rejected the claim of one of the contractors, noticed the submission of the contractor that ITC is never treated as part of the cost and is charged to the profit and loss account, the Arbitral Tribunal failed to appreciate its import and purport. ITC is not to be treated as a cost and it is accounted as an asset in the books of account as laid down in the accounting standards. The Guidance Notes issued by the Institute of Chartered Accountants provides that input credit is liable to be treated as an asset and cannot

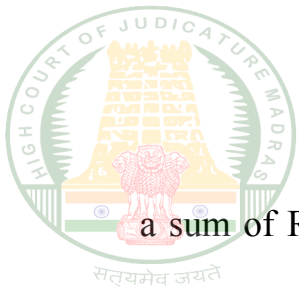


be forming part of cost inventory. Similarly, the Cost Accounting Standard-4 and the Cost Accounting Standard-22 issued by the Institute of Cost Accountants of India (ICAI) provides that ITC is not to be factored in the costing of goods.

20. The Hon'ble Supreme Court in the case reported in **1999 (7) SCC 448 [Collector fo Central Excise, Pune Vs. Dai Ichi Karkaria Ltd]** held that input credit availed does not form part of the cost of the goods and that the Guidance Notes issued by the ICAI are authoritative instructions in determining the accounting standards.

21. The Arbitral Tribunal which had rejected the claim of one of the contractors, had also completely disregarded and failed to take into consideration the fact that a similarly placed contractor was reimbursed, namely, M/s.Kineco Limited, by applying the statutory variation clause due to increase in GST rate from 5% to 12%. No reasoning has been given by the Arbitral Tribunal for non-consideration of the fact that M/s.Kineco Limited was reimbursed with full GST amount by applying the statutory variation clause.

22. The Arbitral Tribunal which had rejected the claim of one of the contractors, who is the petitioner in Arb.O.P.(Com.Div.) No.128 of 2024, held that



a sum of Rs.4.42 crores is required to be passed by the said contractor to ICF in the form of basic price reduction by placing reliance on the Chartered Accountant certificate. However, the Arbitral Tribunal had failed to appreciate that the same document categorically provides that the additional input credit utilized by the contractor due to change in GST rate from 5% to 12% is NIL. As per Clause 2.9 of the GCC, the contractor has provided a declaration, whereby it is specifically declared by the contractor that prices quoted in the contract were arrived after considering the GST set off which was available to the contractor. A revised statement of input credit was submitted by the contractor to the Arbitral Tribunal, which shows that the input credit available with the contractor as on 31.03.2021 was NIL. However, under the impugned arbitral award, this statement has neither been referred to nor relied upon by the Arbitral Tribunal.

23. On the one hand, ICF has sought price revision upto the period when the GST rates were increased from 5% to 12%, i.e., from 01.01.2019 to 30.09.2021, however, on the other hand, ICF has not made any claim for price revision when the GST rates were increased from 12% to 18%. The only submission made by ICF in support of this arbitrary and whimsical approach is that when the rate of GST increased from 12% to 18%, the quantum of ITC was negligible. It is settled law that instrumentality of the State cannot adopt arbitrary, whimsical and



unreasonable approach even in the realm of private contracts.

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24. From the foregoing reasons, it is clear that the impugned arbitral award rejecting one of the contractors claim which is the subject matter in Arb.O.P.No.128 of 2024, suffers from perversity and is patently illegal for the following reasons:-

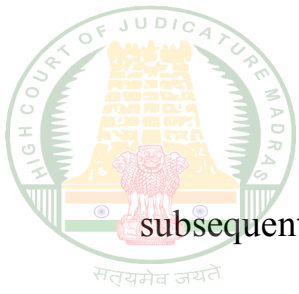
(a) The impugned arbitral award suffers from infirmity on account of misapplication and misreading of the clear terms of the bid document.

(b) The impugned arbitral award disregards the settled position of law regarding ITC under the GST regime.

(c) The impugned arbitral award is an unreasoned award and therefore, is violative of Section 31(3) of the Act.

(d) The impugned arbitral award is passed in ignorance of the vital evidence and therefore, is absolutely perverse in law.

(e) The impugned arbitral award is in conflict with the public policy of India, since the arbitrator has failed to take note of the fact that the contractor involved in the said arbitral award has established beyond reasonable doubt based on the contractual provision that the said contractor is also entitled for an arbitral award in their favour in respect of increase in the rate of GST from 5% to 12%



subsequent to the date of the contract.

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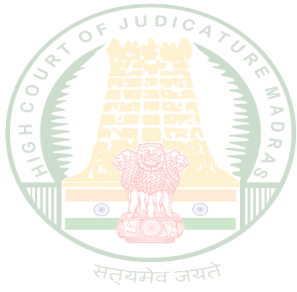
(f) The only possible view that could have been taken by the Arbitral Tribunal is that ICF was contractually bound to reimburse the GST amount to the contractor on account of the statutory variation clause.

25. For the foregoing reasons,

(a) the impugned arbitral award dated 06.11.2023 passed against the petitioner in Arb.O.P.No.128 of 2024, through which the claim of the contractor was rejected, has to be set aside and accordingly, the same is set aside by this Court.

(b) Consequently, Arb.O.P.No.128 of 2024 is allowed as prayed for.

(c) The petitioner in Arb.O.P.No.128 of 2024 is granted liberty to initiate fresh arbitration against ICF in accordance with law. The period spent by both the parties before the Arbitral Tribunal as well as before this Court in this petition filed under Section 34 of the Act shall stand excluded for the purpose of saving limitation under Section



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14 of the Limitation Act.

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(d) Arb.O.P.(Com.Div.) Nos.602 of 2023, 74, 423 to 429 of 2024 and 92 & 172 of 2025 filed by ICF are dismissed. No Costs.

(e) Consequently, all the connected applications are closed.

09.04.2025

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Index:yes
Neutral citation: yes

To

Union of India,
Integral Coach Factory,
Chennai – 38.



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ABDUL QUDDHOSE,J.

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