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

Judgment reserved on: 11.03.2024

Judgment pronounced on: 01.07.2024

\+ **O.M.P. (COMM) 124/2022 & I.A. 4210/2022**

INDIAN RAILWAY CATERING AND TOURISM CORPORATION LTD. ..... Petitioner

Through: Mr Shailender Saini and Ms Rashmi Malhotra, Advs.

versus

M/S DEEPAK AND CO ..... Respondent

Through: Mr Naresh Thanai, Mr Abhilash Mathur and Ms Khushboo Singh, Advs.

\+ **OMP (ENF.) (COMM.) 98/2022 & EX.APPL.(OS) 1461/2023**

M/S DEEPAK AND CO. ..... Decree Holder

Through: Mr Naresh Thanai, Mr Abhilash Mathur and Ms Khushboo Singh, Advs.

versus

INDIAN RAILWAY CATERING AND TOURISM CORPORATION LTD. ..... Judgement Debtor

Through: Mr Shailender Saini and Ms Rashmi Malhotra, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: JASMEET SINGH, J

O.M.P. (COMM) 124/2022

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, "**the Act**") challenging the Final Award dated 07.04.2021 (wrongly mentioned as 08.04.2021 in the petition) (hereinafter, "**Impugned Award**") passed in Arbitration No. 234/2019,

whereby the learned Sole Arbitrator has allowed the claims of the respondent/claimant in the arbitration proceedings.

Facts

2. The brief facts of the present case are:

3. The respondent/claimant is a private railway catering service provider, empaneled with the petitioner-IRCTC, and entitled to be considered for allotment of temporary licenses on Category 'A' trains. With the introduction of the Railway Budget for 2016-17, railway catering services, which were previously provided in a composite mode, were unbundled and primarily separated into distinct functions of food preparation and distribution. Following this restructuring, on 07.09.2016, IRCTC issued a limited tender inviting bids from empaneled parties to provide on-board catering services for Train No. 12951-52/12953-54 (Rajdhani/August Kranti Express) for a six-month period (hereinafter, "**tender document**").

4. The respondent participated in the said tender and was successful. It was granted a temporary license through a Letter of Award dated 06.10.2016 (hereinafter, "**LOA**"). The LOA outlined the amounts payable by the petitioner to the respondent for production charges and service charges for meals (breakfast, lunch, tea, and dinner) provided by the respondent in various A.C. classes on the train. Production charges, which pertained to the cost of actual production of the meal, were inclusive of tax; whereas service charges, which pertained to the cost of serving the meals, were exclusive of tax.

5. From 19.12.2016 to 04.03.2017, IRCTC provided welcome drink which was served to the passengers. On 07.02.2017, IRCTC made the following policy decisions (hereinafter, "**policy decision**"): (a) The service provider (i.e. the respondent herein) must offer a welcome drink to passengers at no extra charge; if unwilling, it could choose to relinquish the temporary

license; (b) If the service provider was supplying meals to passengers due to a shortage by IRCTC, it would be reimbursed production charges at Rs. 84 (inclusive of taxes) per passenger for lunch/dinner for 2nd and 3rd A.C. passengers; (c) In cases where additional meals were served due to the train being delayed by more than 2 hours, the service provider would be reimbursed at Rs. 26.40 plus service tax per passenger.

6. *Vide* letter dated 10.02.2017, the policy decision was communicated to the respondent, to which it responded by raising the following concerns: (i) the respondent argued that the provision of a welcome drink was not specified in the tender document; (ii) it expressed reservations regarding reimbursement of charges for trains delayed by more than 2 hours; (iii) it stated that it had made a significant investment in establishing a base kitchen and infrastructure and was unwilling to terminate the contract.
7. *Vide* letter dated 13.02.2017, the respondent informed IRCTC that it would provide welcome drink to passengers in the event that the same is not provided by IRCTC or the Indian Railways, however it would charge for services as well as the production charges for the same. It also stated that in case the train was late, it would be entitled to charge Rs. 30/- plus service tax for additional meals that would be served to the passengers as per decision of Railway Board which formed part of the tender document.
8. *Vide* letter dated 22.02.2017 and reminder dated 28.02.2017, IRCTC asked the respondent to commence the supply and services of welcome drink with immediate effect. *Vide* letter dated 02.03.2017, the respondent agreed to commence the service from 05.03.2017, however, without prejudice to its rights and contentions raised in the letter dated 10.02.2017. It also stated that it would be claiming charges for the said services.
9. In its letter dated 06.04.2017, IRCTC sought an unconditional acceptance of the policy decision from the respondent, wherein it was stated that

unless unconditional acceptance was tendered by the respondent, it would be presumed that the respondent was not interested in extension of the license and then suitable action would be taken by IRCTC. The respondent, *vide* letter dated 12.04.2017, gave its unconditional consent and sought extension of the temporary license for a further period of six months.

10. The petitioner-IRCTC informed the respondent that since it did not provide welcome drink from 19.12.2016 to 04.03.2017, which then had to be provided by IRCTC, the charges incurred by IRCTC for the same would be adjusted against the bills raised by the respondent upon IRCTC.

11. *Vide* its letter dated 13.05.2017, the respondent pressed the contention of adjustment of welcome drink charges to its account and asserted that it was not liable for the charges of Rs. 6,97,500/- incurred between the period of 19.12.2016 to 04.03.2017, as it was to provide the welcome drink only from 05.03.2017. It also pressed the issue of non-payment of service tax on service charge for food and drink for the said period, as well as other charges allegedly payable to it.

12. On 07.06.2017, a further six-month extension of license was granted to the respondent as per the policy decision, which was unconditionally accepted by the respondent. However, on 25.08.2017, it again pressed the issue of reimbursement of welcome drink charges and other charges adjusted by the petitioner.

13. *Vide* Agreement dated 29.09.2017, it was agreed between the parties that the terms and conditions of the license would be governed by the Letter of Award dated 06.10.2016, the Letter of Acceptance dated 08.10.2016 and the Letter of Extension of License dated 07.06.2017. Upon accepting the terms and conditions of the temporary license unconditionally, the respondent was granted further extensions up to 06.07.2018.

14. The respondent invoked arbitration *vide* letter dated 17.10.2018 on account of disputes between the parties regarding, *inter alia*, deductions made on account of welcome drink, etc.

15. This Court appointed a Sole Arbitrator in the matter, who framed the following issues:

> *"1. Whether catering services to be provided by the Claimant under the temporary license also included the Welcome drink to be supplied to the passengers?*
>
> *2. Whether the claimant is entitled to claim GST on production charges/supply of meals post July 2017?*
>
> *3. Whether alleged wastage of food on account of cancellation/non-turn up passengers is to be borne by the claimant?*
>
> *4. Whether claimant is entitled to Rs. 2,42,847.08 as claimed in Annexure-I, II, and III? If not, as to what amount, if any, the claimant is entitled?*
>
> *5. Whether claimant is entitled to interest, if any? If yes, at what rate and for what period?*
>
> *6. Relief?"*

16. On 15.12.2020, the learned Arbitrator passed an Interim Award on the first three issues, deciding Issue Nos. 1 and 2 in favor of the respondent-claimant and Issue No. 3 against it. It was held by the learned Arbitrator that IRCTC could not have made any deductions with respect to provisioning of welcome drink as the same did not form part of the tender document. It also awarded the reimbursement of the GST deposited by the respondent to the authorities since the same was not included in the rates determined in Annexure-F of the tender document. It further rejected the claim towards wastage of food.

17. In the Interim Award, the substantive issues were decided and what remained was the actual calculation of dues, and the parties agreed that the same were to be made after the Interim Award was passed. As per the Interim Award, the following points remained pending for adjudication:

> *"(i) The amount deducted and the rate at which deduction was made towards welcome drink from the bills raised by the claimant from 19-12-2016 till 04-03-2017, during which the supplies were made by the respondent and also the amount of the service charge and the service tax on the same.*
>
> *(ii) The amount of the cost of welcome drink, at the rate to be indicated in terms of Para- (I) above, for the period 05-03-2017 till 18-06-2017, along with service charge and the service tax, i.e. from the date of start of service of welcome drink by the claimant up to the date of conclusion of the 1st 6 months period of the contract.*
>
> *(iii) The amount of GST on production charges post 01st July, 2017 till the conclusion of the contract for which the challans were submitted by the claimant to the respondent."*

18. On 07.04.2021, the learned Arbitrator decided the remaining issues in favor of the respondent-claimant and passed the Final Award. The operative portion reads as under:

> *"24. Thus, a sum of Rs. 2,18,86,172/- (being Rs. 37,47,824/- and Rs. 41,81,583/- towards production charges of welcome drink,; Rs. 10,61,864/- towards service charge, Rs. 1,59,273/- towards service tax; Rs. 1,03,79,804/- towards GST when its rate was 18% and Rs. 23,55,864/-when its rate was 5%), along with interest @9% payable from 1st November, 2018 till the date of payment and Rs. 1,10,000/- towards cost is awarded in favour of the claimant."*

19. The petitioner challenged the Interim Award under Section 34 of the Act in O.M.P. (COMM.) 103/2021, which was dismissed by a coordinate bench of this Court vide judgment dated 05.07.2021. The appeal against the judgment dated 05.07.2021, being FAO(OS)(COMM) 106/2021, was also dismissed by a Division Bench of this Court on 02.06.2022. The challenge to the judgment dated 02.06.2022, being Special Leave to Appeal (C) No(s). 15712/2022, was also dismissed by the Hon'ble Supreme Court on 20.02.2024, and the Interim Award dated 15.12.2020 was upheld.

Submissions (Petitioner)

20. Learned counsel for the petitioner states that the learned Arbitrator has wrongly proceeded in awarding the cost of supply of wet tissues which was not claimed before him. The petitioner has admitted that only Rs. 26,32,406.95 has been deducted on account of welcome drink, which is also acknowledged by the learned Arbitrator, however he has proceeded to award Rs. 37,47,824/- on account of total deduction made by the petitioner from the bills i.e. the amount including the cost of welcome drink and wet tissues. It is stated that the learned Arbitrator failed to consider that wet tissues did not form part of welcome drink and are a complete separate item which the respondent was required to supply. This is evident from the issues framed by the learned Arbitrator. It is stated that the two items have been mentioned separately in various communications between the parties placed before the learned Arbitrator, as was also evident from the cross-examination of RW1, Shri R. Bhattacharya, Manager, IRCTC, West Zone who stated that the price of the two items i.e. wet tissue and welcome drink was Rs. 1.35 and Rs. 7.23 respectively, thereby, clearly treating the two as separate items. There was no evidence adduced by the respondent to substantiate that the

welcome drink included the wet tissue, or that it was actually provided to the passengers.

21. It is argued that the learned Arbitrator proceeded to grant service charges and service tax on welcome drink even though the Interim Award did not provide for the same. Learned counsel states that it was specifically mentioned that no extra charges were payable to the service provider regarding welcome drinks and the same was accepted by the respondent, and the rate of service charges for providing the welcome drink was neither provided in the agreement nor paid during the currency of agreement. Thus, there was no binding contract regarding the rate of service charge and the same was also admitted by the respondent witness. The learned Arbitrator has, thus, overlooked the explicit contract between the parties and the imposition of rates by him amounted to rewriting the agreement. Reliance is placed upon Section 28(3) of the Act.

22. It is further submitted that the learned Arbitrator proceeded to grant service tax to the respondent despite the fact that during the pendency of the proceedings, the respondent withdrew its claim for service tax and the learned Arbitrator reframed the issues between the parties on 18.11.2020. The following issues were given up:

1. Whether the apportionment charges for lunch/dinner provided in the tender are inclusive of service tax if meals are provided by the claimant?

2. Whether charges of Rs. 30/- for additional meal, in case of late running of train, was inclusive of service tax?

3. Whether charges of Rs. 84/- payable by respondent, in case of increase of passenger's occupancy, included service tax?

4. Whether claimant rendered services till 06.07.2018 on 04.07.2018, as claimed by the respondent? If so, the effect?

23. It is submitted that thus, the respondent gave up its claim for reimbursement of service tax as it was included within the figures determined in Annexure F of the tender document, neither was the rate of percentage indicated anywhere, and hence the award is patently illegal.

24. It is submitted by the learned counsel for the petitioner that the learned Arbitrator has wrongly calculated the amount to be granted as GST in the Final Award. It is stated that the respondent claimed the production charges inclusive of GST while raising invoice and the petitioner accordingly paid the said amounts. Despite this, the respondent has alleged before the learned Arbitrator in its Statement of Claim (hereinafter, "**SOC**") that GST on production charges has not been paid by the petitioner. It is stated that the same was contradicted by the witness of the respondent who admitted the payment of GST on production amounting to Rs. 1,04,54,860.31 and payment of GST amounting to Rs. 21,57,401.86on additional meals, which the learned Arbitrator failed to acknowledge. It is further submitted that the respondent never claimed production charges in the SOC. It is also stated that the production charges have already been paid to the respondent as the record reveals and also as admitted by the witness of the respondent in his cross-examination (CW1) that the amount of Rs. 1,14,57,698.62 towards GST on production charges and supply of additional meals for the period from 01.07.2017 to 14.04.2018 has already been paid to the respondent. It is stated that the respondent has already received the amount of Rs. 1,26,12,262.17 towards GST on production charges for the period from 15.04.2017 to 05.07.2018 at the rate of 5%.

25. It is submitted that the issue regarding production charges/GST was neither pleaded nor pressed by the respondent for framing of an issue before the learned Arbitrator and therefore was never placed for adjudication. Once the issues had already been decided and an interim

award with respect to it has been passed, the respondent could not be allowed to make new claims towards GST/production charges. The learned Arbitrator cannot give a new interpretation holding production charges to be exclusive of GST. It is stated that the respondent has already received all its legal claims including the GST component as it was included under production charges.

26. Regarding the award on interest, learned counsel argues that there was no provision in the contract for payment of interest to the respondent, nor was any notice given under the Interest Act, 1978 to claim interest by damages, and hence, the award of interest is irrational and illegal.

27. Regarding the award on costs, learned counsel argues that the respondent is not entitled to claim cost as in the letter bearing No. 2011/IRCTC/CO/Legal/App Arbitrator dated 18.10.2019, it is specifically stated that the fee and emoluments to retired officers working as arbitrators on the panel of IRCTC shall be shared equally by both parties. The learned Arbitrator has neglected the same, and hence the award is arbitrary and illegal.

Submissions (Respondent)

28. It is submitted by the learned counsel for the respondent that during the pendency of the SLP, the Hon'ble Supreme Court vide order dated 14.03.2023 directed IRCTC to release the awarded amounts except arrears of GST, which was also noted by this Court in the order dated 23.03.2023. In terms of the said orders, IRCTC paid the awarded amounts except arrears of GST. The Final Award stands executed in terms of the aforesaid orders as the amounts have been paid by the petitioner, except arrears of GST; and the present petition does not survive except arrears of GST.

29. It is submitted that the petitioner's argument that VAT etc. should be deducted from production charges while calculating GST (since

production charges were inclusive of taxes) is unsustainable since no such plea was taken by the petitioner in its reply to SOC.

30. It is stated that in the SOC it has been specifically pleaded that post July 2017, IRCTC was liable to pay GST on production charges as well as service charge as service tax was abolished. The same was not paid by IRCTC, even though it had been charging GST from the passengers on the meal supplied by them. It was specifically pleaded by the respondent in its SOC that it has deposited GST on production charges and service charge with the concerned authorities and IRCTC availed benefit of the same. The summaries reflecting the amounts due to the respondent on the aforesaid accounts were annexed as Annexure I, II, and III with the SOC. Thus, the deduction of GST on production charges/meals supplied by the respondent and claimed in its bill is illegal and unsustainable.

31. The plea taken by the petitioner in its reply to the SOC was that since the production charges were inclusive of all taxes, GST over and above the production charges is not payable. The said plea was rejected by the learned Arbitrator by way of the Interim Award, which has now attained finality. It is stated that the reply to the SOC shows that no plea was taken by the petitioner that the production charges since were inclusive of taxes, therefore, while calculating GST, VAT should be deducted from the production charges.

32. It is submitted that the submission of the petitioner – that production charges were inclusive of GST and hence the same stands paid, and the respondent-claimant did not claim production charges in the SOC so the same should be calculated on the basis of the amount already paid to the respondent-claimant – has been extensively dealt with by the learned Arbitrator and rejected.

33. It is further stated that the submission is unsustainable as no such plea was taken in the reply to the SOC, nor was it made before the learned

Arbitrator and nor is it taken as a ground in the present petition. The only ground with regard to GST taken by the petitioner (that the production charges as claimed by the respondent were inclusive of GST and hence stand already paid to the respondent), has been extensively dealt with and rejected by the learned Arbitrator with reasons.

34. Learned counsel for the respondent argues that no ground as contained in Section 34 of the Act is applicable to the present case, the only argument of the petitioner is factual in nature and rejected by the learned Arbitrator. He places reliance upon ***Associate Builders v. DDA***, (2015) 3 SCC 49 and ***Delhi Airport Metro Express (P) Ltd. v. DMRC***, (2022) 1 SCC 131.

Analysis

35. I have heard learned counsel for the parties.

Scope of Section 34 of the Act

36. The Hon'ble Supreme Court in ***Associate Builders*** (supra) has observed as under:

> *"17. It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy in India that the merits of an arbitral award are to be looked into under certain specified circumstances.*
>
> *....*
>
> *29. It is clear that the juristic principle of a ―judicial approach‖ demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.*
>
> *30. The audi alteram partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in*

Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act.

….

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

….

33. It must clearly be understood that when a court is applying the ―public policy‖ test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts….

….

42.1 (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root

of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act….

….

42.2 (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3 (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act….

….

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

37. The position *vis-à-vis* the scope of Section 34 has been summarized more recently in ***Delhi Airport Metro Express*** (supra):

"28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts

setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and

dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

30. Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression ―public policy of India‖ and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

31. In Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , this Court held that the meaning of the expression "fundamental policy of Indian law" would be in accordance with the understanding of this Court in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] . In Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp

(1) SCC 644], this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the "national economic interest", and disregarding the superior Courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of "patent illegality" as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]"

38. A perusal of the aforesaid two judgments shows that Section 34 of the Act has a limited scope, and the award passed by the arbitral tribunal warrants limited judicial interference.

39. In a nutshell, the award can be set aside on the ground of patent illegality if: a) the view taken by the arbitral tribunal is impossible or such that no reasonable person could arrive at it; b) if the arbitral tribunal exceeds its jurisdiction by going beyond the contract and adjudicating upon issues not referred to it; c) the finding of the arbitral tribunal is based on no

evidence or it ignores material evidence. The illegality must go to the root of the matter and does not include mere erroneous application of law or a contravention of law which is unrelated to public policy or public interest. If two views are possible, the Court will not interfere with the view of the arbitral tribunal if it has taken one of the two views. Re-appreciation of evidence is also impermissible.

40. The award can also be set aside on the ground of it being in contravention with public policy of India, the scope of which includes: a) fraud or corruption; b) violation of Sections 75 and 81 of the Act; c) any contravention with the fundamental policy of Indian law; d) violation of the most basic notions of justice or morality, so as to shock the conscience of the Court.

41. With this background, I will deal with the objections raised in this petition.

A. <u>On Inclusion/Exclusion of Wet Tissues</u>

42. Before this Court, the petitioner has argued, broadly, that wet tissue and welcome drink are separate items and claim before the learned Arbitrator was only with respect to the welcome drink, thereby he could not have awarded the cost of both to the respondent. It is argued that the petitioner has admitted that only Rs. 26,32,406.95 has been deducted on account of welcome drink, and the same is acknowledged by the arbitrator, yet he has awarded Rs. 37,47,824/- on account of total deduction made by the petitioner which is illegal and beyond the claims before him or adjudicated in the Interim Award.

43. Before the learned Arbitrator, the petitioner had contended that the welcome drink and wet tissue are separate items, that only Rs. 26,32,406.95 has been deducted due to non-supply of welcome drink by the respondent. In this regard, the learned Arbitrator takes into account

the letter dated 22.02.2017 (relied upon by IRCTC itself), the operative portion of which reads as under:

> *" Please refer to this office letter of even no. dt. 10-02-2017 and C.O letter dt/ 07-02-2017, wherein it had been advised to provide the Welcome Drink (Branded Nimbu Pani in tetra pack and Refreshing Tissue) to the passengers boarding from all the stations with the clarification that no extra charges would be payable to the service provider for welcome drink….*
>
> *It is again clarified that the Welcome Drink and Wet Tissue have to be provided by you and is entirely on your account.*
>
> *….Hence, it is again advised to commence the supply and services of Welcome Drink (Branded Nimbu Pani in tetra pack and Refreshing Tissue) with immediate effect."*

44. The learned Arbitrator makes the following observations: a) "Welcome Drink" has been indicated in brackets to include both –branded Nimbu Pani in tetra pack and the refreshing tissue; b) the direction in the letter by IRCTC to supply both the items together and then claiming the two to be separate is thus contradictory. Similarly, the learned Arbitrator has also placed reliance upon the letters dated 10.02.2017 and 28.02.2017 wherein it is specifically mentioned in the brackets for welcome drink to include the tetra pack and refreshing tissue.

45. The learned Arbitrator rejected the testimony of RW-1 wherein he denied that welcome drink included wet tissue, as documents on record i.e. letters dated 10.02.2017, 22.02.2017 and 28.02.2017 categorically show otherwise. The learned Arbitrator also notes that this issue (regarding the two items being separate) was never raised by the petitioner at any stage of the proceedings except at the time of making the actual calculation of dues.

46. Hence, the learned Arbitrator's interpretation, based on documentary evidence, to suggest that the welcome drink was inclusive of wet tissue was a plausible one, and not so unreasonable to render the award perverse or patently illegal.

47. Before the learned Arbitrator as well, as before this Court, the petitioner contended that the respondent failed to adduce any evidence to substantiate that the wet tissues were actually provided to the passengers. In this regard, the learned Arbitrator notes that the RW-1 in his cross-examination has admitted to the fact that the claimant served tetra packs and wet tissues to the passengers, and that IRCTC deducted Rs. 7.23 per unit for tetra pack and Rs. 1.35 per unit towards wet tissue for the period from 19.12.2016 to 04.03.2017.

48. The learned Arbitrator further states that the argument of lack of evidence of whether the wet tissue was provided or not is not tenable. The learned Arbitrator held that if the instructions of IRCTC were not complied with by the respondent, IRCTC could have and would have taken necessary action against the respondent, which was not taken. The cross-examination of RW-1 regarding the deductions made by IRCTC for the welcome drink and wet tissue served as corroborating evidence.

49. The learned Arbitrator's observation that the petitioner could have invoked its remedies in case wet tissues were actually not being supplied, but it did not do so and this suggests that there was no non-compliance by the respondent, is also a plausible one. The findings of the learned Arbitrator are reasoned, based on evidence, and not perverse.

50. The learned Arbitrator has noted the admission of the petitioner's witness in his cross-examination that: a) Rs. 37,47,824 was deducted by the petitioner towards the amounts paid to the respondent (Rs. 7.23 per unit for tetra pack and Rs. 1.35 per unit towards wet tissue); and b) welcome drinks and wet tissues were supplied by the respondent *w.e.f.* 05.03.2017.

Based on this, the learned Arbirator has awarded a sum of Rs. 37,47,824/- (for deductions made by IRCTC towards supplies made by them from 19.12.2016 to 04.03.2017) and Rs. 41,81,583/- (for production charges of welcome drink, including tetra pack, from 05.03.2017 to 18.06.2017). Hence, I am of the view that the learned Arbitrator has correctly awarded the amount to the respondent and find no infirmity with his reasoning.

B. On Service Charges

51. Regarding this issue, the contention of the petitioner, broadly, is that service charges/service tax on the welcome drink has been awarded to the respondent even though the Interim Award does not provide for grant of the same, nor is there any stipulation about the rate of service charges in the contract especially for welcome drink. It is argued that in the absence of such provision in the contract, the learned Arbitrator has travelled beyond the terms of the contract between the parties and has overlooked Section 28(3) of the Act.

52. The issue regarding whether service charges are due to the respondent or not was also raised before the learned Arbitrator. After considering the submissions of both the parties, the learned Arbitrator rejected the argument of the petitioner that there was no contract between the parties warranting payment of service charges and held that vide the Interim Award, the supply of welcome drink was found not to form part of the contract for initial period of 6 months and therefore the respondent was entitled to production charges, service charges, as well as the service tax thereupon for the said initial period of 6 months. He iterated that the issue is regarding what should be the service charge.

53. The learned Arbitrator held that the respondent, in its response to the letter dated 10.02.2017, specifically mentioned that it agreed to the supply of services (welcome drink and wet tissue) against the production and service charges quoted separately. Vide letter dated 02.03.2017, the

respondent also stated that it would be claiming charges for the aforesaid services at an appropriate time. The learned Arbitrator noted that the petitioner did not respond to the said letter of the respondent either before or after the supply of the services were started by the respondent and this amounted to implied consent. Based on this and as per the bid documents, the learned Arbitrator found force in the contention of the respondent that the service charges stipulated in the contract ranged from 20-30% and since, admittedly, no rate of service charges for providing the welcome drink was provided in the agreement, the learned Arbitrator held that rate claimed by the respondent being less than 17% was therefore reasonable.

54. The learned Arbitrator further held that there was no force in the argument of the petitioner that there was no binding contract between the parties regarding the rate of service charges, as the letters written by the petitioner directed the respondent to provide welcome drink (including the refreshing tissue), to which the respondent had reluctantly agreed subject to collection of charges at appropriate time. In the learned Arbitrator's view, this was impliedly accepted by the petitioner and thus, it neither re-wrote nor novated the agreement.

55. I find no infirmity with the findings of the learned Arbitrator. Since there was no contract between the parties for providing the welcome drink (including the wet tissues) to the passengers for the initial period of 6 months as held in the Interim Award (and upheld by the Hon'ble Supreme Court), the learned Arbitrator's view that the petitioner was liable to pay production charges, service charges as well as service tax on the same is the correct view. No perversity can be attributed to the conclusion drawn by the learned Arbitrator in holding that in the letters, the respondent had explicitly mentioned that it would be claiming charges for the welcome drink (and wet tissues) in due time, and the same was not objected to by the petitioner in as much as it continued with the contract

and kept extending. The service charges claimed by the respondent (under or about 17%) are much less than the charges stipulated in the contract, which ranged from 20-30%, which is duly noted by the learned Arbitrator. In my view, the findings of the learned Arbitrator are neither unreasonable nor perverse in this regard and take into account the agreement between the parties as well as their conduct.

C. On Service Tax

56. The petitioner has argued that the respondent has given up its claim for reimbursement of service tax when the issues were reframed. Nowhere is the rate of percentage of service tax indicated, and thus, the award is illegal on this account.

57. When the same argument was raised by the petitioner before the learned Arbitrator, he was of the view that only specific issues were dropped and no general issue regarding payment of service tax was either framed or dropped or reframed and thus he rejected the petitioner's argument that the issue of service tax was dropped by the respondent. The learned Arbitrator held that it was not correct to state that the issues between the parties were reframed on 18.11.2020, as contended by the petitioner. It is only that certain issues were dropped (as mentioned above) and the remaining issues were left to be decided in the original form.

58. I find no infirmity with this finding. There was no specific issue framed (or subsequently dropped) on the inclusion of service tax as far as the welcome drink was concerned. Since the dues on welcome drink were yet to be decided at the passing of the Interim Award, it is not unreasonable of the learned Arbitrator to hold that service tax was also payable by the petitioner on the welcome drink since there was no contract between the parties regarding the said services for the initial period of 6 months, and post that, the petitioner had impliedly agreed to being charged for the said services. Merely because a few issues were dropped regarding service tax

on specific items/services, the learned Arbitrator is not unreasonable in holding that no general issue on payment of service tax has been dropped by the respondent. Hence, the finding of the learned Arbitrator does not warrant interference by this Court.

D. On GST

59. Before this Court, the petitioner has contended that: a) GST has been wrongly calculated. Since the production charges included VAT, the same should be deducted before adding the GST component; b) GST was included in the invoices submitted by the respondent, and the same has been paid. Witness of the respondent has admitted the payment of GST on production and on additional meals, however the arbitrator has failed to acknowledge the same; c) Issue regarding production charges/GST and reversed GST/Extra Meal/Dinner was neither pleaded nor pressed for framing of the issue by the respondent before the learned Arbitrator and was thus never adjudicated. New claims regarding GST/production charges etc. cannot be made now.

60. In response to each argument, the respondent has argued that: a) No such plea was taken by IRCTC in its reply to the SOC that VAT should be deducted while calculating GST; b) The second ground has been dealt with by the learned Arbitrator. The plea that production charges were inclusive of GST has been rejected by the learned Arbitrator in the Interim Award, which has attained finality; c) In the SOC, it has been specifically pleaded that the respondent deposited GST on production charges/service charge with the authorities and IRCTC availed benefit of it. It is also pleaded that since IRCTC has been charging GST from passengers on the meal supplied by them, the deduction of GST is illegal. The amounts due have also been annexed with the SOC in the respective annexures.

61. Before the learned Arbitrator, the petitioner has contended that only amount of GST charges due are Rs. 16,95,543.91 (Rs. 1,43,07,806.08 – Rs. 1,26,12,262.17) because whatever was claimed has already been paid under the head of production charges, service charge, service tax/GST to the knowledge of the respondent.

62. At the outset, the learned Arbitrator held that the issues related to the payment of GST were dealt with in detail in the Issue No. 1 in the Interim Award wherein it was concluded that the GST is admissible to the respondent on production charges, which means that the GST is payable over and above the production charges and the respondent is to be reimbursed of GST. The learned Arbitrator was of the view that the petitioner cannot now reopen the issue to argue that GST was not admissible to the respondent.

63. The learned Arbitrator noted that the petitioner deducted amounts of GST included in the bills raised by the respondent from time to time, and it is these sums deducted by the petitioner which have been claimed in the SOC. In the annexures to the SOC as well, summary of short payment is given, and net difference is claimed. He held that it is not correct to state that part of the GST has already been paid by the petitioner and only the difference is payable when the production charges were bifurcated by the petitioner with the assumption that the GST was inclusive of production charges. The petitioner's argument before this Court i.e. that GST has already been paid and that the respondent has not even claimed reverse production charges is untenable since the learned Arbitrator has already dealt with this ground and I find no infirmity in his reasoning.

64. The learned Arbitrator states that the accepted rates which constitute the contract between the parties have been given in the letter dated 06.10.2016 and a false impression has been created in the mind of the petitioner that GST has already been paid as it is included in the charges

and as no claim has been made by the respondent separately. The learned Arbitrator has noted the testimony of RW-1 who admitted that the petitioner did not pay GST on the production charges as claimed by the respondent.

65. On the basis of these findings, the learned Arbitrator held that the only issue left to be decided is regarding the amount of GST payable. Relying upon the cross-examination of RW-1 dated 12.03.2021, the learned Arbitrator noted that it was admitted by RW-1 (as assisted by the official from Finance Department of the West Zone, IRCTC) after verifying from the records that the production charges and extra meal claimed in the invoices and payment made towards production charges, GST thereupon are correctly reflected in Annexure-1 of the affidavit dated 02.01.2021 and accordingly, he awarded to the respondent an amount of Rs. 1,03,79,803.83 as recoverable towards GST including the amount bifurcated from production charges when GST was 18% and Rs. 23,55,864.20 when GST was 5%.

66. I find no infirmity with the finding of the learned Arbitrator and the same is sound and well-supported by reasoning, due consideration of the evidence and documents on record. It was settled in the Interim Award itself that GST was payable to the respondent over and above the production charges, and the same has attained finality. The petitioner cannot now urge an argument before this Court that production charges, since were inclusive of taxes (VAT), were to be bifurcated before payment of GST. Further, RW-1 has categorically stated in its cross-examination that GST on production charges and extra meal charges have been claimed by the respondent and correctly reflected in Annexure-1 of the affidavit dated 02.01.2021.The petitioner's argument that GST on production charges were never claimed is thus untenable, as the learned

Arbitrator has duly recorded a finding to the contrary. I find no grounds to interfere with the findings of the learned Arbitrator to this extent.

E. On Interest

67. The learned Arbitrator has exercised its powers under Section 31(7) of the Act to grant interest to the awarded sum in the present case in favor of the respondent. He notes that under Section 31(7)(a), he has the power to grant pre-arbitration period interest (which included the pre-reference period and pendente lite interest) and incorporate the same in the contract in case the parties fail to finalize an interest rate. Referencing Section 31(7)(b), he states that the arbitrator has the power to grant a reasonable post-award interest.

68. The learned Arbitrator further stated that in the present case, there is no clause in the agreement for non-payment of any interest to the respondent. However, since welcome drink was found not to be a part of the contract, the learned Arbitrator found it equitable to grant interest over and above production charges. Referencing to Section 31(7) of the Act, as well as Section 2(b) of the Interest Act, 1978, it held that since the maximum rate of interest being paid by banks is about 7% per annum, the respondent is entitled to 9% per annum interest on the award amount from 01.11.2018, when the arbitration was initiated, till the date of payment appeared to be reasonable. I find no infirmity with the findings of the learned Arbitrator.

F. Regarding Costs

69. The learned Arbitrator has acknowledged the letter bearing No. 2011/IRCTC/CO/Legal/App Arbitrator dated 18.10.2019 wherein it is stated that the fee and emoluments to retired officers working as arbitrators on the panel of IRCTC shall be shared equally by both parties. However, it has referenced to Section 31A of the Act to state that the arbitral tribunal has the discretion to determine costs payable by one party

to another. He has delved into an in-depth discussion of the said provision, as well as relevant case laws, before deciding that since 2 out of 3 issues in the Interim Award as well as substantial claim in the Final Award has been decided in favor of the respondent, it is justified to award the cost of the proceedings to the tune of Rs. 1,10,000/- to the respondent.

70. In ***ONGC v. Afcons Gunanusa JV, 2022 SCC OnLine SC 1122***, the Hon'ble Supreme Court has held that:

> *"**99.**__**The concepts of costs and fees in arbitration must be distinguished.**__ Fees constitute compensation or remuneration payable to the arbitrators for their service….*
>
> *….*
>
> ***101.** In contrast, costs are typically compensation payable by the losing party to the winning party for the expenses the latter incurred by participating in the proceedings….*
>
> ***102.** The principle of the payment of "costs" remains the same in litigation and arbitration even though the form of expenses may vary…..*
>
> ***103.**The first category of "costs of the tribunal" includes the fees, travel-related and other expenses, payable to the arbitrators. However, this category also includes fees and expenses relating to the experts appointed by the tribunal, administrative secretary or registrar and other incidental expenses incurred by the tribunal in respect of the case [Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration (6th Edn., 2015), Chapter 9.]. __**Fees of arbitrators constitute a component of the diverse elements which make up the costs that are payable by one party to another.**__*

> ***112.*** *While the Arbitral Tribunal can exercise a lien over the arbitral award for any unpaid costs of arbitration under Section 39(1) of the Arbitration Act, a party can also approach the Court for the release of the award and the Court on inquiry can assess whether the costs demanded are reasonable under Section 39(2).* ***These costs would include the arbitrators' fees that have been previously agreed upon.*** *However, even if there is no agreement between the parties and the arbitrator(s) regarding the fees payable to the arbitrator(s), any determination of costs relating to arbitrators' fees by the tribunal is a non-binding demand that has been raised by the tribunal.* ***As has been discussed above, while costs, in general, are to be decided at the discretion of the tribunal or the Court because they involve a claim that one party has against another relating to resolution of a dispute arising from the arbitration agreement, fees of the arbitrators are not a claim to be decided between the parties.*** *Rather, it is an independent claim that the arbitrator(s) have against the parties [Paras 110-111 of this judgment.] . It will be for the Court to decide whether the claim of the arbitrator(s) regarding their remuneration is reasonable…."*
>
> (emphasis supplied)

71. The letter bearing No. 2011/IRCTC/CO/Legal/App is regarding the fees payable to the arbitrator. It states that the fee of the arbitrator shall be shared equally by both parties. This does not amount to an agreement regarding costs. As held in ***ONGC v. Afcons Gunanusa JV*** (supra), fees and costs are two different concepts and fees can form part of the costs payable by the losing party. Hence, the letter bearing No. 2011/IRCTC/CO/Legal/App has no bearing on the costs granted by the

learned Arbitrator and is thus irrelevant for the imposition of such costs in the present case.

72. Imposition of costs is a discretionary power vested with the arbitral tribunal. The learned Arbitrator held that in the present matter, the respondent tried to settle the matter, however, since negotiations failed, hearings had to be conducted. In the Interim Award, 2 out of 3 issues were decided against the petitioner. In the Final Award, a substantial claim of Rs. 2,18,86,172 (as against the claimed amount of Rs. 2,42,05,846.59) has been awarded against the petitioner. Hence, the learned Arbitrator held that it was justified that the petitioner paid the cost of the proceedings. Since the respondent had paid Rs. 1,38,650/- towards fee of the arbitral tribunal, the learned Arbitrator granted Rs. 1,10,000/- as costs of the proceedings to the respondent.

73. The costs granted by the learned Arbitrator are reasonable and granted after due consideration of different factors and in consonance with Section 31A of the Act, as discussed in the Final Award. I find no infirmity with the findings of the learned Arbitrator. The same is sound and credible.

Conclusion

74. In view of the aforesaid, I am of the view that the petitioner has failed to make out any ground for interference with the award under Section 34 of the Act.

75. For the reasons stated above, the petition is dismissed.

76. All pending applications, if any, are hereby disposed of.

O.M.P. (ENF.) (COMM.) 98/2022

77. In view of the judgment passed in O.M.P. (COMM) 124/2022, the execution petition is allowed.

78. In accordance with the Final Award dated 07.04.2021**,** the judgment-debtor is directed to pay to the decree-holder the awarded amount along with interest and costs within four weeks from today.

79. The petition along with pending applications, if any, is disposed of in the aforesaid terms.

JASMEET SINGH, J

JULY 01, 2024 /skm

Click here to check corrigendum, if any