

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.610 OF 2016

M/s Creative Engineers	...	Petitioner
Versus		
Union of India		
Through : The General Manager		
Western Railway	...	Respondent

Mr. Kamlesh Sukhwani a/w Mr. Paras Sukhwani I/b Ms. Suvarna Joshi for the Petitioner.
Mr. Suresh Kumar a/w Ms. Mohinee Chougule for the Respondent.

CORAM : S.C.GUPTE, J.

DATE : 29 NOVEMBER 2018

(Oral Judgment)

Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed by a Sole Arbitrator in a reference arising out of a contract for manufacture and supply of Glued Insulated Rail Joints of particular type and quantity as per an order placed by General Manager, Western Railway on the Petitioner. The disputes between the parties involve a claim for reimbursement of excise duty paid by the contractor, the Petitioner herein, for the rail joints manufactured and supplied for the Respondent-Union of India.

3 In pursuance of an invitation to tender issued by the Respondent
herein, the Petitioner gave its offer of manufacture and supply of rail joints.

A purchase order was placed by the Respondent on the Petitioner, accepting its tender. The purchase order provided that, as of that date, no excise duty was payable on the goods, but if any duty became applicable by the time of the dispatch, the same would be reimbursed by the Respondent, subject to production of documentary evidence of payment of such duty. According to the purchase order, for this purpose, excise duty would be considered as 16 per cent; any variation due to increase in turnover was not to be applicable. It is the case of the Petitioner that it supplied the requisite quantities of glued insulated rail joints to the Respondent, paying excise duty in the sum of Rs.8,07,340/-. It produced documentary proof of having made such payment, in the form of a certificate issued by the Superintendent, Central Excise, Range III, Kota (Rajasthan) dated 16 October 2003. Out of this amount, a sum of Rs.3,66,336/- was reimbursed to the Petitioner by the Respondent in March 2003, leaving a balance of Rs.4,41,004/-. The Respondent contested the Petitioner's claim for reimbursement of this balance. As a result, disputes arose between the parties, which were referred to the sole arbitrator, who was the Deputy Chief Engineer, Planning, Western Railway. The claims referred were as per a submission made by General Manager, Western Railway, who was the appointing authority. These were contractor's claims for sums of Rs.4,41,004/- towards excise duty and of Rs.1,04,400/- towards fabrication and transport charges. As for railways, their counter claim was said to be of nil amount. It was in accordance with this submission that the learned arbitrator adjudicated the reference. The arbitrator, in his impugned award, not only disallowed the Petitioner's claim for balance reimbursement of Rs.4,41,004/-, but even allowed refund of the reimbursement of Rs.3,66,336/- already made by the Respondent.

Both these aspects have been challenged in the present petition.

4 The Petitioner claimed reimbursement on the basis that fabrication of glued rail joints was covered under sub-heading 8530 of Central Excise Tariff Act, 1985, in which there was no exemption of excise duty at the relevant time and accordingly, the Petitioner had paid the applicable excise duty. The Petitioner produced documentary evidence of having paid the duty. The Petitioner also relied upon a judgment of Customs, Excise and Gold (Control) Appellate Tribunal in the case of Dynamic Engineers & Madan Mohan Gupta Vs. CCE Jaipur, delivered on 16 January 2001, by which classification by the excise authorities of GIR Joints, that is to say, goods involved in the present petition, under tariff item 8530 of the Schedule to the Central Excise Tariff Act, 1985, was accepted as correct. Despite the Petitioner having thus made out a case of classification of the subject goods under tariff item 8530 and having paid duty thereunder, the learned arbitrator held that glued joints, which were articles of iron or steel, were liable to be termed as construction material for railway or tramway falling within Chapter 73 and particularly, sub-heading 7302 of Central Excise Tariff Act, 1985 and were, accordingly, entitled to exemption from payment of excise duty under sub-heading 7302 under Notification No.3/2001-C.E. 1st March, 2001. The learned arbitrator held that Chapter 85 of Central Excise Tariff Act, 1985, which was for “Electrical machinery and equipments and parts thereof”, sub-heading 8530 being for “Electrical signaling, safety or traffic control equipments for railways, tramway”, was not applicable to the subject goods. The arbitrator was no authority for determination of classification of the goods. When Central Excise authorities had determined the classification under sub-heading

8530 of the Schedule to the Central Excise Tariff Act, 1985 and the Appellate Tribunal had accepted such classification, the learned arbitrator had no business to disagree or to hold that the goods were classifiable under another sub-heading. The award exhibits an approach which cannot be termed as judicious. Not following a binding judgment of a superior or competent court is an arbitrary act, which is an obverse of a judicial conduct, which is one of the fundamental principles of judicial process, and is in breach of public policy of India. In the face of determination of tariff by a properly constituted authority, whose judgment was binding on the learned arbitrator, the learned arbitrator could not have decided the matter otherwise. It is pertinent to note that in this case, the Petitioner had not only made out a case of its liability to pay excise duty, but proved having in fact paid such duty on the subject goods by producing conclusive evidence to that effect before the learned arbitrator. In the face of such proof, there was absolutely no warrant for denying the claim for reimbursement.

5 The other reason, which appears to have weighed with the learned arbitrator, was that the turnover of the Petitioner was less than Rs.1 crore at the time of acceptance of its offer by the railways and that it was only later that its turnover exceeded Rs.1 crore, resulting into its liability for payment of excise duty. The learned arbitrator held that under the contract between the parties, any variation due to increase in turnover was not admissible for reimbursement. The learned arbitrator held that the incidence of excise duty, in the premises, having arisen merely as a result of an increase in the Petitioner's turnover, the excise duty paid by the Petitioner was not liable to be reimbursed. In the first place, there is

nothing on record before the learned arbitrator, nothing is pointed out at least to this court, that the subject contract was awarded to the Petitioner on account of its status as a small scale industry or having regard to its turnover of less than Rs.1 crore. The learned arbitrator, at any rate, has not anywhere found it to be so. In that case, there is absolutely no basis for denying the Petitioner's claim on the ground of inapplicability of the variation due to increase in turnover. The impugned award, on this point, thus, exhibits an impossible view.

6 The impugned award, in other words, displays contravention of fundamental principles of Indian legal system, namely, it fails, in the first place, to exhibit a judicial approach, inasmuch as, as noted above, in the face of a binding authority of Central Excise Appellate Tribunal, the learned arbitrator rejects the Petitioner's case for reimbursement of excise duty actually paid under a correct classification and, secondly, and at any rate, applies a stipulation in the contract for disallowing the claim without there being any basis whatsoever, that is to say, on an impossible view.

7 It is also important to note that the terms of submission formulated for the arbitrator by the appointing authority did not admit of consideration of any claim on the part of the Respondent for refund of the duty reimbursed to the Petitioner. In the terms of submission, the Respondent's counter-claim was stated to be nil. If and to the extent the impugned award considers and grants a counter-claim for refund of the reimbursed amount of excise duty actually paid by the Respondent to the Petitioner, the award can certainly be termed as a determination not coming within, or not contemplated by, the terms of the submission to

arbitration. The award is, thus, liable to be set aside under clause (iv) of sub-section (2) of Section 34 of the Arbitration and Conciliation Act, 1996.

8 In the premises, the arbitration petition is allowed, by setting aside the impugned award to the extent it rejects the Petitioner's claim for reimbursement of the excise duty paid by it and also to the extent it awards the counter claim of the Respondent in the sum of Rs.3,66,336/-. No order as to costs.

(S.C. GUPTE, J.)