

CASE NO.:
Appeal (civil) 4857 of 2007

PETITIONER:
The Security Printing and Minting Corporation of India Limited & Anr

RESPONDENT:
M/s. Gandhi Industrial Corporation

DATE OF JUDGMENT: 12/10/2007

BENCH:
A.K.MATHUR & D.K.JAIN

JUDGMENT:
J U D G M E N T
{Arising out of S.L.P.(c) NO.2290 of 2007}
A.K.MATHUR, J.

1. Leave granted.

2. This appeal is directed against the order passed by the Division Bench of the Bombay High Court whereby the arbitration award given by the sole arbitrator was affirmed by learned Single Judge of the High Court and in appeal affirmed by the Division Bench by its order dated 22.9.2006. Hence the present appeal by the appellant- Security Printing and Minting Corporation of India Limited and another.

3. Brief facts which are necessary for disposal of this appeal are that the appellant No.2 is the General Manager of India Security Press which is a Government of India Undertaking functioning under the Ministry of Finance. M/s.Gandhi Industrial Corporation (hereinafter to be referred to as 'the claimant') is a partnership firm. Prior to 1966, the appellant No.2 before us (hereinafter to be referred to as 'the security press') was importing its entire requirement of gummed stamp paper from foreign countries. From 1967 onwards the security press commenced purchasing of Ashoka Pillar water mark stamp base paper from Paper manufacturing mills. The base paper was thereafter gummed and super-calendared by the contractor on a job work. In 1967 the claimant established a pilot plant for purpose of manufacturing gummed stamp paper at the instance of appellant- security press. The claimant set up the factory at Umbergaon in Thane district and the plant was commissioned in 1969. The claimant received orders for gumming and super-calendaring of stamp based papers. In the year 1976 the appellant for the first time floated tender for gumming and super-calendaring work. Again in 1989 the Security press floated tender and the claimant questioned the action of the security press by filing writ petition before the High Court but did not succeed. The tender was again floated in 1996 and the grievance of the claimant was that though the offer made by it was the lowest and the claimant further reduced the rates in view of the agreement reached between the parties, which agreement has been described as memorandum of understanding, for offering the work exclusively to the claimant for a period of 10 years so as to enable the claimant to optimally utilize the capacity of its plant. Then certain orders were given to other persons which was protested by the claimant and it filed a writ petition on the original side of the High Court of Bombay. The claimant also filed arbitration application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred to as 'the Act'). The High Court of

Bombay with the consent of parties nominated Justice Shri M.L.Pendse (retired) as the sole arbitrator to adjudicate the disputes and differences between the parties by its order dated 7.12.2001. The claimant thereafter informed the High Court that Writ Petition No.3980 of 1996 be withdrawn and the issues raised therein may also be referred to arbitration. We are not concerned with other issues. We are only concerned with one issue which has been raised before us for our consideration i.e. point No.4 and the order of the Arbitrator pertaining to claim No.3. It related to the value of modvat. The claimant sought a sum of Rs.2,95,99,673/- on the basis that the value of the modvat was to the extent of Rs.51,48,468/- to which compound interest at the rate of 25.50 per cent per annum was payable by the security press to the claimant. The claimant submitted that in March, 1994 the claimant's unit was covered by Rule 57A of the Central Excise Rules, 1994 (hereinafter to be referred to as 'the Rules') and thereby the Modvat scheme became applicable. The claim for modvat credit can be made only by the manufacture. After the claimant was covered under the Modvat scheme the security press issued necessary gate passes to enable the claimant to avail of the modvat credit. The security press floated tenders on 2.5.1994 and the tender documents nowhere suggested that the modvat credit will not be available to the manufacturer for the work of gumming and super-calendaring of stamp paper and the same shall be available to the security press. As against this, it was alleged by the Security Press that the offer document specifically recited that the claimant would be entitled to receive the modvat credit and the security press shall issue necessary documents including the gate passes to enable the claimant availing modvat credit. The security press while placing the orders on 31.5.1994 added a term that the modvat credit if any, availed by the claimant will have to be passed on to the security press. The claimant by its letter dated 5.6.1995 agreed to accept the order subject to withdrawal of the term relating to passing of modvat credit to the security press. The claimant stated that only on confirmation/ modification of this condition that it would proceed with the execution of the contract. The security press did not respond but forwarded base paper to the claimant to carry out the work of gumming and super-calendaring of base paper. The finished goods were delivered by the claimant along with necessary documents including the gate passes for endorsement by the security press. The claimant used to remind them from time to time that the modvat credit is only available to the manufacturer i.e. the claimant. It appears that no positive response was given to the claimant. On 16.10.1995 the appellant- security press for the first time informed that the matter would be examined and the decision would be communicated. By letter dated 30.12.1995 the appellant's security press informed that the modvat credit availed by the claimant would have to be transferred to the security press. Though the claimant did not accept the same but the view of the security press remained unchanged. Though a lot of negotiation took place on this issue but without any result. Finally on 25.7.1996 the security press informed the claimant that the modvat credit availed by the claimant after 1996 will be adjusted by deduction of the amounts payable to the claimant. Accordingly, the modvat credit availed by the claimant was deducted by the security press. Therefore, this issue was raised in arbitration that the modvat credit cannot be claimed by the security press and the same was only available to the manufacturer i.e. the claimant. The Arbitrator after considering the matter came to the conclusion that this claim of the security press cannot be accepted and the arbitrator decided the issue in favour of the claimant and answered the point No.4

that the claimant was entitled to a sum of Rs.50,64,155/-. Other issues were also decided by the Arbitrator by his award dated 4.10.2004. Thereafter, application under Section 34 of the Act was filed before the learned Single Judge and learned Single Judge affirmed the finding of the arbitrator by its order dated 13.3.2006 and aggrieved against that order, an appeal was preferred before the Division Bench of the High Court. The Division Bench affirmed the view taken by learned Single Judge and hence the appellants are before this Court in the present appeal.

4. We have heard learned counsel for the parties and perused the record. The basic question before us is whether the appellant- security press was entitled to get the benefit of modvat credit or not. In order to appreciate the controversy it will be profitable to first reproduce the relevant clause of the supply order which relates to credit of modvat to the security press. The clause reads as under: \026

\023 2. TAXES/CED: No sales Tax at present. This will be paid extra, if & when applicable, on presentation of documentary evidence. Excise Duty is payable as per rules and Modvat Credit, if any, availed b the Firm against element of Excise Duty included in the Base Paper, is to be passed on to the India Security Press. Octroi Exemption Certificates will be issued, as per requirement.\024

This was one of the terms and conditions of the purchase order. It is true that when the advertisement was issued there was no such condition but when the purchase order was issued it clearly stipulated this condition and it was accepted by the claimant, though it protested which is evident from the communication dated 5.6.1995 which reads as under :

\023 GANDHI INDUSTRIAL CORPORATION
SPEED POST
GIC/ISP/S.O.291/95/079/95-96 5.06.1995
The General Manager,
India Security Press,
Nashik Road, C.Rly.
Dear Sir,
Reg: Your S.O. No.PR-30(Adh)/291/95 dt.31.5.95
For Gumming & Supercalendaring of all over Ashoka
Pillar Watermarked Stamp Base Paper Reels and
Cutting into Reels & Sheets.

We acknowledge the receipt of your above referred Supply Order dt.31.5.95 and have to inform you that since there was considerable delay in its finalization, our entire costing has gone awry as our plant and labour, all tailor made only for doing your above said job have remained idle for the last 5 months, putting us to a great loss. Our capacity utilization during 1994-95 was utilized. Such under utilization of our capacity is going on since last 5-6 years, causing us great hardship. You are aware that we have put up our plant only for you and that there is no such huge demand for such a job from the general market. We do not mind even if you give us little lesser rate but it is our humble request to you to kindly utilize our capacity optimally.

Under such circumstances, we agree to accept your

aforesaid order with a request that for future, a durable long term arrangement be worked out on mutually acceptable terms so that I.S.P. regularly and at reasonable rates and our plant and labour remain optimally utilized all round the year. We have also to request you to :

i) Kindly withdraw the clause relating to the Modvat Credit to be passed on to I.S.P. since it is extraneous to the tender conditions.
Xx xx xx.\024

Therefore, the supply order which had the aforesaid condition was protested by the claimant-respondent herein. On 5.6.1995 however, it had protested for withdrawal of the clause relating to Modvat credit since it was extraneous to the tender conditions. Thereafter, on 20.6.1995 the respondent herein again explained to the General Manager, Security Press that the Modvat credit was available only to manufacture and that too from the payment of excise duty as per Rule 57H of the Central Excise Rules and it was not a cash benefit, it is only a book credit and hence it was not refundable. Therefore, this modvat credit was not legally available to the Security Press. As such it requested that this condition be deleted. On 16.10.1995 a communication was sent by the Security Press to the claimant that the issue of modvat credit was being examined and further communication in this regard would follow in due course of time. Thereafter, on 30.12.1995 a clear reply was sent to the claimant informing that it was not possible to accede to the request of the claimant for waiving the condition of modvat credit. It was clearly informed to the claimant that since the Modvat credit was directly linked with the payment of Excise duty indicated in the terms and conditions of the tender as well as the referred order, the benefits, if any, will have to be invariably passed on to the India Security Press and this cannot be waived under any circumstances. The aforesaid communication dated 30.12.1995 is reproduced as under :

\023GOVERNMENT OF INDIA

From
The General Manager,
India Security Press,
NASIK ROAD-422101

Reference No.15858/PR-30(ADH) Dated 30/12/1995

To
M/s Gandhi Industrial Corporation,
20, Ajmal Road, Opp. Malaviya Road,
Vile Parle (East)
BOMBAY-400057

Sub: ISP Order No.PR-30(ADH)/291/95/ dated 31/5/1995

Sir,

Further to this office letter No.10866/PR-30 dated 16/10/1995, it is to inform you that since the Modvat Credit is directly linked with the payment of Excise duty indicated in the terms and conditions of the tender as well as the referred order, the benefits, if any, will have to be invariably passed on to the India Security Press and this cannot be waived under any circumstances.

2. Hence, you are advised in your own interest to arrange to pass on all the benefit availed against Modvat Credit

immediately.

Yours faithfully
Sd/- xx
(B.S.LALCHANDANI)

DY.GENERAL MANAGER\024

Then, again on 12.1.1996 the claimant tried to argue with the appellant that the modvat credit is only available to the manufacture i.e. the claimant and it is not allowed in cash but it is a book entry.

5. Now, in the background of these communication, the Arbitrator took the view that since the modvat credit is only available to the manufacture on account of book credit and the claimant was the manufacture, therefore, the appellant cannot get that benefit. It was also observed that the unilateral decision taken by the appellant is entirely against the Modvat scheme and contrary to tender notice issued and on the basis of which offer was made by the claimant. It is not permissible to alter the terms and condition of the offer letter to the detriment of contractor who has been awarded the tender contract and certainly not by unilateral decision.

6. Learned counsel for the appellants submitted that in fact the complete contract has come into existence after the supply order dated 31.5.1995 and it was accepted by the claimant and the terms and conditions which were mentioned in the supply order are binding and not the advertisement which was floated where these terms and conditions were not mentioned. Learned counsel further submitted that once the contract has come into existence between the parties the terms of the contract shall govern and not the earlier so called conditions when the tenders were floated inviting tenderers to file their response to the offer. Whatever may be the terms and conditions of the advertisement which were floated, that is not binding and what is binding is the terms and conditions of the contract. Therefore, as per the terms and conditions of clause (i) of the supply order, the claimant has to refund the modvat credit to the security press. Learned counsel also submitted that modvat credit is available on the excise duty paid by the party and in this case the papers on which the excise duty was paid by the appellant- security press. Thus the gate passes were given to the claimant to claim the benefit of modvat credit and on the basis of excise duty paid on the paper by the security press, the benefit was drawn by the claimant by producing the gate passes and the benefit of modvat credit was claimed by the claimant on that basis. Therefore, it was submitted that the security press is entitled to the benefit of modvat credit. As against this, learned counsel for the respondent submits that since the modvat credit is only available to the manufacturer and it was clearly understood that this will go to the claimant. Therefore, the view taken by the Arbitrator, affirmed by learned Single Judge and the Division Bench of the High Court is correct and in support thereof, invited our attention to a decision of this Court in *Ramji Dayawala & Sons (P) Ltd. v. Invest Import* [(1981) 1 SCC 80]. This case was decided on the question of fact only. In the present case as mentioned above, the terms and conditions were very clear and despite the protest by the claimant for deletion of the modvat credit benefit, it supplied the goods and it was informed that change in the supply order cannot be acceded to. Therefore, there is no question of any principle of sub silentio. There is no ambiguity or any tacit understanding. Learned counsel further submitted that the

finding of the Arbitrator should not be interfered with because the Arbitrator is the best judge and the Courts should not interfere with the finding of the Arbitrator or the interpretation given by the Arbitrator. In support of his contention, learned counsel invited our attention to the decisions of this Court in Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] and in Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd. [(2006) 11SCC 245]. In ONGC Ltd. (supra) this Court has laid down certain parameters that in certain cases, the Court can set aside the award if it is contrary to fundamental policy of Indian law, or the interest of India; or justice or morality; or is patently illegal; or is so unfair and unreasonable that it shocks the conscience of the Court. In the present case on the face of the terms of the contract, the award, in our opinion, appears to be patently illegal as the terms and conditions of the supply order would govern and not the terms of the tender. Therefore, this case does not help the claimant in any manner. In Centrotrade Minerals & Metals Inc (supra) there was difference of opinion between brother Judges and it was referred to a larger Bench. Therefore, that case also does not help the respondent herein.

7. Learned counsel for the claimant also submitted that at the time when the tender was floated, there was no condition incorporated therein that the Modvat credit will be claimed by the appellant- security press. Therefore, the view taken by the Arbitrator as well as learned Single Judge and the Division Bench of the High Court is correct.

8. After hearing learned counsel for the parties and perusing the record we are of opinion that the view taken by the Arbitrator and affirmed by the learned Single Judge and the Division Bench of the High Court cannot be sustained. Firstly, when the terms and conditions have been reduced in the supply order dated 31.5.1995, therein the condition of modvat credit was incorporated and it was accepted by the claimant. The contract had come into existence and the supply had been started on the basis of that supply order. Though the claimant had protested with regard to this clause but the appellant did not accede to the request of the respondent for deleting that clause and the appellant had informed the claimant on 31.12.1995 that there was no change in the conditions of the supply order still claimant continued to supply the goods as per the order. Therefore, on the face of this condition there is no going back from that. In case the claimant was not inclined to accept this clause he could have very well withdrawn from the contract. But it did not do so and continued with the contract. Therefore, on the basis of the clear terms of the contract, the claimant is bound by it and it has to restore whatever the modvat credit received by it to the appellant security press. The view taken by the Arbitrator that since it was not the condition when the tender was floated is not correct as after the complete contract having come into existence, there is no purpose to refer to the terms of tender. What is binding is the completed contract and not the terms of offer of the advertisement. Whatever may be the offers in the advertisement, once the completed contract has come into existence, this is binding. There is no two opinion in the matter in the present case that the terms and conditions of the supply order dated 31.5.1995 were complete. Therefore, what is binding is the terms of the contract and not the terms in the offer of advertisement. Therefore, under these circumstances the view taken by the Arbitrator as well as learned Single Judge and the Division Bench of the High Court is ex facie illegal. It is true that normally the Courts are very slow in interfering

with the finding and interpretation given by the Arbitrator. So far as the principle of law is concerned, there is no two opinion and it has to be accepted. But the fact remains that if any perverse order is passed, then the Courts are not powerless to interfere with the matter. As pointed out above, once the concluded contract has come into existence, then in that case the offer of advertisement cannot override the terms and conditions of the completed contract. Therefore, in our opinion, the view taken by the Arbitrator, as affirmed by learned Single Judge and the Division Bench of the High Court on the face of it is illegal and against the law.

9. Secondly, learned counsel has submitted that the principle of sub silentio applies in the present case. There is no question of principle of sub silentio involved in the present case. The terms and conditions of the contract are very clear and it was clearly understood by the claimant as it protested that the condition with regard to Modvat credit should not be allowed to continue in the terms and conditions of the contract and the same may be deleted which is evident from the communication dated 5.6.1995 and 20.6.1995. Therefore, there was no misunderstanding. There was no question of applying the principle of sub silentio when the terms and conditions were well known and clearly understood between the parties. More so, the modvat credit is available in order to avoid double taxation on the papers which were imported by the appellant-security press after paying the excise duty and therefore, the claimant claimed the benefit of excise duty paid by the security press and the security press had issued gate passes and documentary evidence for the payment of excise duty on which the claimant claimed the benefit of modvat credit. Therefore, on that count also the benefit could legitimately be claimed by the appellants as they have paid the excise duty also. Therefore, under these circumstances, we are of opinion that the view taken by the Arbitrator, as well as learned Single Judge and the Division Bench of the High Court cannot be sustained and we accordingly, allow this appeal and set aside the order of the Arbitrator with regard to the modvat credit and also the view taken by learned Single Judge and the Division Bench of the High Court of Bombay to this extent. The appellants will be entitled to retain the amount(s) equivalent to the Modvat credit as claimed by the respondent. There would be no order as to costs.