

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
***ORDINARY ORIGINAL CIVIL JURISDICTION***  
**ARBITRATION PETITION NO. 1619 OF 2015**

**Union of India** )  
**Acting through,** )  
**Controller of Stores,** )  
**Western Railway, 4<sup>th</sup> Floor,** )  
**Station Building Churchgate,** )  
**Mumbai 400 020** ) **..... Petitioner**

**VERSUS**

**M/s.Motor & General Sales Ltd.** )  
**Fabrication Division Unit II,** )  
**A 2/2 UPSIDC, Indl Area Dewa Road)**  
**Chinhat Lucknow 226020 (U.P.)** ) **..... Respondent**

Mr.Suresh Kumar for the Petitioner.

Mr.Kuldeep Nikam for the Respondent.

**CORAM : R.D. DHANUKA, J.**

**DATE : 1<sup>st</sup> JULY, 2016**

**JUDGMENT**

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 9<sup>th</sup> February, 2015 passed by the learned arbitrator directing the refund of the amount deducted from the bills of the respondent by the petitioner as liquidated damages according to the re-fixation of delivery. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. On or about 8<sup>th</sup> May, 2012, the petitioner invited open tender no.23/12/8028 for 370 sets of “Set of Body Side Arrangement Assembled with Flap Doors and Body End Arrangement for BOXNR Wagon” issued through IREPS with the

approval of competent authority with delivery period within 60 days. The said tender was opened on 12<sup>th</sup> June, 2012. The respondent herein submitted their offer with delivery period of 60 days. Since the offer made by the respondent was found competent, the petitioner issued Advance Acceptance Letter dated 14<sup>th</sup> January, 2013 to the respondent with delivery period within 60 days. The petitioner placed final purchase order upon the respondent on 22<sup>nd</sup> January, 2013 with delivery period of 60 days.

3. It is the case of the petitioner that after release of the said purchase order, the respondent applied for amendment in RITES to RDSO. The petitioner accordingly issued an amendment in inspection agency from RITES to RDSO on 28<sup>th</sup> January, 2013.

4. The respondent thereafter supplied 30 sets within original delivery period and requested vide their letter dated 30<sup>th</sup> March, 2013 to issue modification of purchase order with re-fixation of delivery schedule upto 31<sup>st</sup> August, 2013 without payment of liquidated damages. It is the case of the petitioner that the petitioner though granted extension of delivery period upto 30<sup>th</sup> September, 2013, the extension was granted with liquidated damages by an amendment issued on 20<sup>th</sup> September, 2013.

5. It is the case of the petitioner that in view of the said amendment to the original contract granting extension to the respondent with the provisions of liquidated damages, the respondent had delivered the material to the petitioner without any demur. The petitioner deducted various amounts from the running bills of the respondent. This recovery of the amount towards liquidated damages was challenged by the respondent by invoking the arbitration agreement and

referring the dispute to the learned arbitrator.

6. Pursuant to the liberty granted by the learned arbitrator, the respondent herein filed a statement of claim which was resisted by the petitioner. It is not in dispute that none of the parties led oral evidence before the learned arbitrator.

7. The learned arbitrator made an award on 9<sup>th</sup> February, 2015 thereby directing the petitioner to release the amount deducted from the bills of the respondent towards liquidated damages according to re-verification of the delivery. The learned arbitrator also re-fixed the delivery period as 30<sup>th</sup> August, 2013. The petitioner has impugned the said award in this petition filed under section 34 of the Arbitration and Conciliation Act, 1996.

8. Mr.Suresh Kumar, learned counsel for the petitioner invited my attention to the findings recorded by the learned arbitrator. He submits that admittedly the petitioner had amended the contract and granted extension of time at the request of the respondent which extension was subject to payment of liquidated damages. He submits that since the respondent herein accepted the extension granted by the petitioner with liquidated damages and had supplied/delivered the material to the petitioner, the petitioner was right in deducting the amount of liquidated damages from the bills of the respondent. He submits that the learned arbitrator thus could not have awarded the claim for refund of the liquidated damages conducted by the petitioner.

9. Mr.Nikam, learned counsel appearing for the respondent on the other hand invited my attention to various findings of fact rendered by the learned arbitrator and would submit that the findings of fact rendered by the learned arbitrator being

not perverse, cannot be interfered with by this court under section 34 of the Arbitration and Conciliation Act, 1996.

10. It is submitted that the learned arbitrator has rendered a finding that the petitioner did not suffer any loss though the petitioner had granted extension of time to deliver the goods to the petitioner. He submits that it was neither pleaded by the petitioner nor proved before the learned arbitrator that the so-called liquidated damages mentioned in the letter of extension was a genuine and reasonable pre- estimate damages agreed by the parties. He submits that the learned arbitrator was thus justified in allowing the claim for refund of liquidated damages deducted by the petitioner.

11. Learned counsel for the respondent placed reliance on the judgment of this court dated 28<sup>th</sup> July, 2015 in case of ***Hindustan Petroleum Corporation Limited vs.M/s.Offshore Infrastructure Limited*** in Arbitration Petition No.869 of 2012 and in particular paragraphs 27 and 28 of the said judgment. Reliance is also placed on the judgment of this court in case of ***M/s.B.E.Bilimoria & Co. Ltd. vs.M/s.Raheja Universal Private Ltd.***, (2015) SCC Online Bom. 5614 and in particular paragraphs 34 to 38.

12. Mr.Suresh Kumar, learned counsel for the petitioner in rejoinder does not dispute the proposition laid down by this court in case of ***Hindustan Petroleum Corporation Limited*** (supra) and ***M/s.B.E.Bilimoria & Co. Ltd.*** (supra).

13. There is no dispute that the respondent had applied for extension of time without payment of liquidated damages. The petitioner however had granted extension of time with liquidated damages. The question however that arises for

consideration of this court is that if the petitioner has not suffered any losses during the period of extension granted by the petitioner to the respondent at their request, whether the petitioner could have recovered any amount from the respondent towards the liquidated damages.

14. It is not in dispute that it was not the case of the petitioner that the liquidated damages mentioned in the letter of extension was a genuine and reasonable pre-estimate of the damages agreed by the parties. Admittedly the petitioner had neither pleaded nor proved that the petitioner had suffered any losses due to the extended delivery period permitted by the petitioner to the respondent at their request.

15. A perusal of the grounds raised in the arbitration petition also clearly indicates that even in the grounds it is not the case of the petitioner that the petitioner had suffered any losses due to extended delivery period or that the petitioner was not required to prove any such alleged losses.

16. A perusal of the record indicates that the learned arbitrator after considering the facts has rendered a finding that the petitioner had not suffered any loss as their production plan had not been affected and therefore delay in supply had not resulted in the loss to the petitioner. The petitioner has not challenged the said finding in the arbitration petition.

17. This court in case of *M/s.B.E.Bilimoria & Co. Ltd.* (supra) after adverting to the judgment of Supreme Court in case of *Kailash Nath Associates vs. Delhi Development Authority* decided on 9<sup>th</sup> January, 2015 in Civil Appeal No.193 of 2015 and judgment of this court in case of *Hindustan Petroleum Corporation*

**Limited** (supra) has held that unless the employer would have pleaded and proved that the amount mentioned as liquidated damages in the contract was of genuine pre-estimate amount of damage or loss and the employer would have proved the actual loss suffered, no amount could be recovered as and by way of liquidated damages.

18. Supreme Court in case of **Kailash Nath Associates** (supra) has held that there cannot be any windfall in favour of the respondent to recover liquidated damages even if no loss is suffered or proved. In my view the judgment of Supreme Court in case of **Kailash Nath Associates** (supra) and judgment of this court in case of **M/s.B.E.Bilimoria & Co. Ltd.** (supra) squarely applies to the facts of this case. I am respectfully bound by the said two judgments.

19. In my view since the petitioner neither pleaded that the liquidated damages mentioned in the letter of extension was a genuine and reasonable pre-estimate, damages agreed by the parties and nor proved the loss suffered by the petitioner, the learned arbitrator was justified in allowing the claims made by the respondent for refund of an amount of liquidated damages deducted by the petitioner from the bills of the petitioner.

20. In my view the petition is devoid of merits and is accordingly dismissed. No order as to costs.

**[R.D. DHANUKA, J.]**