

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 556 OF 2014
ALONGWITH
ARBITRATION PETITION NO. 680 OF 2014

M/s.Auto Craft Engineers,)
A Partnership Firm registered under the)
Indian Partnership Act, 1966 having its)
registered office at 6, Mehta Chambers,)
Kalyan Street, Mumbai 400009) **..... Petitioner**

VERSUS

Akshar Automobiles Agencies Private)
Limited,)
A private limited company registered)
under the Companies Act, 1956 having)
its office at Plot No.1,)
Mohan Mills Compound, Ghodbunder)
Road, Thane (West) 400 706) **..... Respondent**

Mr.A.Kumbhakoni, Senior Advocate, a/w. Mr.Shardul Singh, i/b. Mr.Kunal Bhanage for the Petitioner.

Mr.Pravin Samdhani, Senior Advocate, a/w. Mr.Arun Mehta, Ms.Pooja Thorat, Ms.Sanika Mehta, i/b. Akshar Laws for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 12th JULY, 2016

PRONOUNCED ON : 29th JULY, 2016

JUDGMENT :

By these two petitions filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short the 'Arbitration Act') both the petitioners have impugned the ex-parte award dated 24th September, 2013 passed by the learned

arbitrator allowing the claims made by the respondent. Since the facts in both the arbitration petitions are identical, by consent of parties, both the petitions were heard together and are being disposed of by a common order and judgment.

2. Learned senior counsel appearing for the parties have addressed this court in the Arbitration Petition No.556 of 2014 and thus the facts in the said arbitration petition are summarized in the later part of this judgment. It is agreed by and between the parties that the conclusion drawn by this court in the Arbitration Petition No.556 of 2014 will apply also to the Arbitration Petition No. 680 of 2014.

3. The petitioner is a sister company of M/s.Navnit Motors Pvt. Ltd., an authorized dealer for Maruti Suzuki India Ltd. The respondent is owner of the piece or parcel of land or ground admeasuring 40,000 sq.ft. carpet area or thereabout togetherwith sheds and structures standing thereon bearing Survey No.326 A, Plot No.1 and Survey No.326(P), Plot No.1 lying being and situated at Village Majiwada, Taluka and District Thane.

4. Sometime in the year 2008-09, the petitioner was desirous of setting up of another showroom and workshop for the said company in and around Ghodbunder Road, Thane. On or about 16th March, 2009, the petitioner and the respondent entered into a leave and licence agreement in respect of a portion of larger property admeasuring 20,000 sq.ft. carpet area on various terms and conditions agreed and recorded in the said agreement. Under the said agreement, the petitioner had deposited a sum of Rs.25 lacs as and by way of security deposit free of interest with the respondent. There was a locking period of 12 months agreed by and between the parties under the said leave and licence agreement. It is

the case of the petitioner that the said leave and licence agreement was subject to the approval of M/s.Maruti Udyog Ltd. insofar as the selection of the said premises was concerned. According to the petitioner, the said premises were not vacant and available for the petitioner and was occupied by the previous licensee M/s.Global Gallarie which licensee was running its showroom of Mahendra Jeeps and continued to occupy the said premises. The petitioner had not occupied the said premises even for a day.

5. It was the case of the petitioner that on 23rd March, 2009, M/s.Maruti Udyog did not approve the said premises. On 25th March, 2009, the parties met and agreed to put an end to the said leave and licence agreement. The respondent had alleged to have assured the petitioner that the said cheque of Rs.25 lacs issued by the petitioner towards security deposit would be returned to the petitioner or the said cheque would be destroyed.

6. The petitioner sent an e-mail to the respondent on 27th March, 2009 recording various discussions arrived at in the meeting between the parties. The respondent replied the said e-mail vide their letter dated 31st March, 2009 and denied the alleged understanding arrived at between the parties though alleged to have been admitted at the meeting held between the parties. The petitioner thereafter issued instructions to their bankers to stop payment in respect of the said cheque of Rs.25 lacs issued by the petitioner. There was further correspondence exchanged between the parties.

7. On 29th June, 2011, the respondent herein invoked the arbitration agreement after expiry of two years of the last correspondence exchanged between the parties. On 16th March, 2012, the Designate of the Hon'ble Chief Justice

passed an order in the application filed by the respondent under section 11 of the Arbitration Act and appointed a senior counsel of this court as a sole arbitrator. The respondent abandoned the claim of licence fees and sought to claim damages only in the arbitral proceedings.

8. In the preliminary meeting held by the learned arbitrator on 14th June, 2012, the learned arbitrator issued various directions to the parties and also fixed his fees to be paid by both the parties. It is the case of the petitioner that in the said preliminary meeting dated 14th June, 2012, the learned arbitrator did not issue any directions for imposing cost in the event of any party seeking any adjournment of the meeting proposed to be held. The learned advocate representing the petitioner remained absent in the said preliminary meeting held by the learned arbitrator. The respondent thereafter filed a statement of claim before the learned arbitrator. The petitioner filed written statement on 24th September, 2012.

9. On 1st October, 2012, the learned arbitrator fixed a meeting on 5th October, 2012 for framing issues. It is the case of the petitioner that the said meeting proposed to be held on 5th October, 2012 however was adjourned at the request of the respondent to 17th October, 2012. The learned arbitrator did not impose any cost upon the respondent for seeking adjournment of the said proposed meeting to be held on 5th October, 2012.

10. On 17th October, 2012, the learned arbitrator framed issues and issued further directions. The learned arbitrator fixed the dates of hearing as 24th to 26th July, 2013 for completion of evidence and fixed the dates as 1st and 2nd August, 2013 for arguments. The learned arbitrator directed the parties to deposit Rs.4,50,000/- each towards his fees. It is the case of the petitioner that the

petitioner deposited the amount of Rs.4,80,000/- towards the fees of the learned arbitrator. The respondent initially did not deposit their share of fees of the learned arbitrator.

11. It is the case of the petitioner that on 13th December,2012, the learned arbitrator by his e-mail unilaterally re-scheduled the dates to 29th to 31st July, 2013 and 1st and 2nd August, 2013. It is the case of the petitioner that on 5th April, 2013, the learned arbitrator once again vide his e-mail revised the dates to 30th and 31st July, 2013 and 2nd and 3rd August, 2013. According to the petitioner these were the dates on which the first time matter was fixed for recording evidence.

12. It is the case of the petitioner that on 21st June, 2013 i.e. 38 days prior to the scheduled date of the meeting proposed to be held on 30th and 31st July, 2013 and 2nd and 3rd August,2013, the petitioner filed a detailed application before the learned arbitrator requesting for re-scheduling the dates fixed on 29th and 30th July, 2013 by 15 days on the ground that the only witness Mr.Jayendra Kachalia whose affidavit in evidence was already filed by the petitioner was travelling a business tour abroad and would not be available in India during that period. It is the case of the petitioner that the said application for re-scheduling the dates by 15 days was not opposed by the respondent. The learned arbitrator heard the said application dated 21st June 2013 on 1st July 2013. It is the case of the petitioner that even on that day also, the respondent did not oppose the request of the petitioner for re-scheduling the dates fixed for 29th to 31st July, 2016 by 15 days.

13. The learned arbitrator cancelled the hearing dates fixed on 30th and 31st July, 2013 and 2nd and 3rd August, 2013 and adjourned the matter to 23rd to 27th September, 2013 from 11.00 a.m. to 5.00 p.m. subject to the condition that the

petitioner herein pays the cost to the respondent herein equivalent to the share of the respondent herein in the fees of the learned arbitrator for the said hearings equivalent to Rs.3 lacs and also Rs.60,000/- towards the cost awarded to the respondent. The learned arbitrator directed the petitioner to pay the said cost of Rs.3,60,000/- to the respondent on or before 30th July, 2013 and made it clear that the said payment of cost shall be the condition precedent to further participation of the petitioner in the further arbitration proceedings. The learned arbitrator also directed the respondent herein to deposit his fees as directed in the minutes of the meeting held on 17th October, 2013. The learned arbitrator also directed each party to deposit a further sum of Rs.3,75,000/- with the learned arbitrator on or before 31st August, 2013 for the five hearings fixed for 23rd to 27th September, 2013.

14. The petitioner vide their letter dated 11th July, 2013 addressed to the learned arbitrator raised protest against the learned arbitrator on the ground that the adjournment was sought by the petitioner on genuine grounds setout in the application and that also well in advance before the actual dates of hearing. It was stated in the said letter that no inconvenience was caused either to the learned arbitrator or to the respondent in any manner or no prejudice had been caused or shown to have been caused to the respondent by adjournment. The petitioner expressed its unwillingness to comply with the said order imposing cost as a condition precedent and contended that the said order imposing cost was unreasonable, penal, harsh, onerous, unfair and unjustifiable. The petitioner also recorded that the petitioner had already complied with all earlier directions issued by the learned arbitrator.

15. On 13th July, 2013, the learned arbitrator sent an e-mail recording that he was reluctant to cancel the hearing which was fixed several months in advance

and he had believed that there had to be discipline in adhering to the schedule of hearing and the same should not be lightly disturbed. However, keeping in mind the convenience of the witness of the petitioner herein and inspite of opposition of the respondent, the learned arbitrator had granted time to the petitioner on the condition of payment of costs. It is stated in the said e-mail that if the petitioner did not wish to comply with the conditions, it ought to have been carried on with the hearings on the dates originally fixed. It was stated that having obtained cancellation of hearing, it was not correct to now make submissions about the condition on which the cancellation was granted. The learned arbitrator conveyed that it was not possible for him to get any other matter fixed on the cancelled dates, which he had specifically blocked for those hearings.

16. In the said e-mail, the learned arbitrator gave option to the petitioner i.e. (i) if the petitioner choose, the dates originally fixed will remain the dates for hearing, but that decision should be communicated by 5 pm on the same day, (ii) if they still wish that the original dates should be cancelled and the hearing should proceed on the newly fixed dates, it must comply with the condition on which cancellation was granted. In the said e-mail the learned arbitrator reiterated the decision for payment of costs as ordered by the learned arbitrator as a condition precedent to the petitioner further participating in the matter and made it clear that if the petitioner choose to proceed on the newly fixed dates and did not comply with the order for costs, the matter would be proceeded with ex-parte and the petitioner shall not be permitted to participate further in the matter. The said e-mail was sent by the learned arbitrator to the advocates representing the parties at 10.20 a.m. on 13th July, 2013 itself.

17. It is the case of the petitioner that it was not possible to exercise any

option as given by the learned arbitrator and to convey their decision by 5 o'clock to the learned arbitrator on the same day. The petitioner could not comply with the conditional order passed by the learned arbitrator and did not pay the cost as condition precedent on 30th July, 2013.

18. On 12th August, 2013, the petitioner filed an application under sections 12 and 13 of the Arbitration Act before the learned arbitrator alleging bias and unfair treatment alleged to have been given to the petitioner by the learned arbitrator and called upon the learned arbitrator to forthwith withdraw from the arbitral proceedings.

19. On 23rd September, 2013 the learned arbitrator held a hearing on the revised dates. The petitioner did not appear before the learned arbitrator. The learned arbitrator therefore adjourned the hearing to 24th September, 2013 for giving one more opportunity to the petitioner to appear before him and to comply with the earlier directions. The respondent issued a notice to the petitioner on 23rd September, 2013 and informed that the meeting was adjourned to 24th September, 2013. On 24th September, 2013, the petitioner failed to remain present before the learned arbitrator. The learned arbitrator rejected the application filed by the petitioner under sections 12 and 13 on 24th September, 2013 and made an ex-parte award against the petitioner directing the petitioner to pay a sum for Rs.60 lacs in each of the matter with interest at the rate of 12% per annum from 1st April, 2009 till the date of the award with arbitration cost quantified at Rs.8,75,000/-.

20. It is the case of the respondent that though the petitioner filed the arbitration petition on 24th October, 2013 and though the arbitration petition came up for rejection before the learned Prothonotary and Senior Master for non

removal of the office objections on 1st April, 2014, the arbitration petition was finally numbered only on 4th April, 2014 in view of the petitioner not having taking efforts to get the matter listed or heard. The respondent thereafter filed a precipe before this court for seeking circulation of the arbitration petition. This court granted circulation of the arbitration petition for 10th December, 2014. The petitioner impugned the two separate arbitral awards by filing two separate arbitration petitions.

21. Mr.Kumbhakoni, learned senior counsel appearing for the petitioner invited my attention to the various annexures annexed to the petition and also the findings rendered by the learned arbitrator in the impugned award. It is submitted by the learned senior counsel that on 5th October, 2012, the learned arbitrator had postponed the said meeting at the request of the respondent to 17th October, 2012 without imposing any cost upon the respondent. He submits that on 13th December, 2012, the learned arbitrator by his e-mail had unilaterally re-scheduled the dates of the arbitration meetings to 29th to 31st July, 2013. On 5th April, 2013, the learned arbitrator once again unilaterally re-scheduled the dates to 30th and 31st July, 2013 and 2nd and 3rd August, 2013 and the matter was fixed for recording evidence.

22. It is submitted that since the the only witness proposed to be examined by the petitioner Mr.Jayendra Kachalia, who was the Managing Director of Navnit Motors and was selected by Polaris India Private Limited for his valuable participation at the “Washington calling International Sales Meet” to be held in USA in which various people from all across the world were participating and the same could not have been re-scheduled only for the convenience of the said witness Mr.Jayendra Kachalia 38 days prior to the date of the proposed

meeting by the learned arbitrator, the petitioner applied vide its application dated 21st June, 2013 to the learned arbitrator for re-scheduling the meetings after 15th August, 2013. He submits that the said witness, who was familiar with the entire matter and his presence was necessary to assist the learned counsel for the petitioner, such application for re-scheduling the dates well in advance was made.

23. It is submitted that though the learned arbitrator agreed to postpone the proposed dates of hearing, the same was postponed by imposing heavy cost as a condition precedent for participating in the arbitral proceedings in future. He submits that the learned arbitrator could not have passed such unprecedented order of payment of heavy cost as condition precedent before allowing the petitioner to participate in the arbitration proceedings in future. He submits that the petitioner had already deposited the fees for those meetings proposed to be held on 29th and 31st July, 2013 and 2nd and 3rd August, 2013.

24. It is submitted that though the petitioner thereafter protested against the said unreasonable and harsh order and made it clear that it would not be possible for the petitioner to comply with the said harsh and unreasonable order, the learned arbitrator did not agree to recall the said order dated 2nd July, 2013 and called upon the petitioner to exercise the option of continuing the arbitration proceedings on the date earlier fixed by the learned arbitrator or to pay the cost as directed as a condition precedent for participation of the petitioner in the arbitration proceedings in future. He submits that the e-mail dated 13th July, 2013 was sent by the learned arbitrator at 10:40 a.m. to the learned advocate of the petitioner and the petitioner was called upon to exercise one of the two options by 5:00 p.m. on the same day. He submits that this order of the learned arbitrator was totally harsh and unreasonable and illegal. The petitioner could not remain present

before the learned arbitrator in the meeting held by the learned arbitrator on 23rd September, 2013 since the petitioner could not comply with the said order of imposing cost as a condition precedent and was prevented from participation in the meetings held in future.

25. It is submitted by the learned senior counsel that though the learned arbitrator had not imposed any cost for granting adjournment to the respondent and had himself unilaterally re-scheduled the dates of hearing on the earlier two dates, the learned arbitrator refused to re-schedule the dates without imposing any cost as a condition precedent though the request was made by the petitioner for re-scheduling the dates till 15th August, 2013 due to unavoidable circumstances set out in the said application. He submits that the petitioner was thus unable to present its case before the learned arbitrator. He submits that the impugned award is liable to be set aside on that ground itself under section 34(2)(a)(iii) of the Arbitration & Conciliation Act, 1996. He submits that the learned arbitrator has not treated both the parties equally.

26. It is submitted by the learned senior counsel for the petitioner that the respondent had not opposed the application for re-scheduling the dates before the learned arbitrator because of the alleged inconvenience caused to it. He submits that the petitioner had already deposited the amount in respect of the provisional dates fixed by the learned arbitrator.

27. It is submitted that though the petitioner was issued notices for remaining present in the meeting held on 24th September, 2013, the petitioner could not have availed the said opportunity to remain present on 24th September, 2013 in view of the learned arbitrator once again insisting the petitioner to comply

with the earlier order of cost condition precedent for the participation in the said meeting.

28. Learned senior counsel for the petitioner placed reliance on the judgment of the Supreme Court in case of ***Sanjeev Kumar Jain vs. Raghubir Saran Charitable Trust & ors., (2012) 2 SCC 455*** and in particular paragraphs 37 to 42 and would submit that even under section 31(8) of the Arbitration & Conciliation Act, 1996, the learned arbitrator could have awarded only reasonable cost and not actual expenditure.

29. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of ***Modula India vs. Kamakshya Singh Deo, (1988) 4 SCC 619*** and more particularly paragraphs 18 to 24 and would submit that even if the petitioner could not pay the cost for re-scheduling the dates of the arbitration proceedings, the learned arbitrator could not have deprived the petitioner of participation in the arbitration proceedings on the ground of non-payment of cost for re-schedulement of the arbitration proceedings to the respondent herein. He submits that the respondent as a matter of record had not even insisted for such cost for the re-schedulement in view of the genuine and unavoidable circumstances placed on record by the petitioner.

30. It is submitted that the learned arbitrator even did not grant an opportunity to the petitioner to remain present on the re-scheduled dates of arbitration hearings for the purpose of examination of the witness examined by the respondent and to participate at the time of hearing of the arbitration proceedings. He submits that even if the learned arbitrator could have struck off the defence of the petitioner herein, the learned arbitrator could not have refused the participation

of the petitioner.

31. Learned senior counsel for the petitioner placed reliance on the judgment of the Division Bench of this Court in case of ***Sheshrao Raibhan Ingale vs. Shilpa Sheshrao Ingale, 2005 (1) Mh.L.J. 188*** and in particular paragraph 18 in support of the submission that even if the written statement of the petitioner would have been struck off, that would not prevent the petitioner from cross-examining the witness examined by the respondent herein and from showing on the basis of the material on record that the respondent herein was not entitled to any claim made in the statement of claim.

32. Without prejudice to the aforesaid submissions made by the learned senior counsel on the issue of violation of principles of natural justice, he invited my attention to the *ex-parte* findings recorded by the learned arbitrator in the impugned award thereby allowing the claim for damages made by the respondent. He submits that the respondent had not proved the claim for damages before the learned arbitrator. The suit premises was not even vacant when the petitioner was granted license by the respondent in respect of the suit premises. He submits that the onus was on the respondent to prove that the suit premises was lying vacant when the petitioner did not enter and occupy the said premises during the locking period.

33. It is submitted that there was neither any plea in the statement of claim about the steps taken by the respondent to mitigate such alleged loss nor the respondent proved the same in the arbitration proceedings. In support of this submission learned senior counsel placed reliance on the judgment of the Delhi High court in case of ***Tower Vision India Private Limited vs. Procall Private***

Limited, 2012 SCC OnLine Del, 4396 and in particular paragraphs 4, 13 and 16 and would submit that since the respondent had not taken reasonable steps to mitigate the loss during the locking period, the respondent was not entitled to be awarded any claim for damages during locking period. He submits that such claim for damages during the locking period was a remote or indirect loss. He submits that since no loss was suffered by the respondent, the learned arbitrator could not have awarded such claim for damages. In support of this submission, learned senior counsel also placed reliance on the judgment of the Supreme Court in case of **Murlidhar Chiranjilal vs. Harishchandra Dwarkadas & Anr., AIR 1962 SC 366** and in particular paragraph 9. Reliance is also placed on the judgment of the Supreme Court in case of **Kailash Nath Associates vs. Delhi Development Authority & Anr., (2015) 4 SCC 136** and in particular paragraphs 43 and 44.

34. Learned senior counsel for the petitioner placed reliance on the judgment of this Court in case of **Mithalal B. Gurjar vs. Union of India & Ors., 2015(4) Mh.L.J. 733** and in particular paragraph 19 in support of the submission that a party who claims compensation is required to prove that actual loss was suffered by such party due to alleged breaches of contract committed by other party. He also placed reliance on the judgment of of this Court in case of **Star India Private Limited vs. Kaleidoscope Entertainment Private Limited, (2015) 5 Bom.C.R. 107**, and in particular paragraphs 69 to 71 in support of the submission that the claim for compensation could not have been awarded by the learned arbitrator since the respondent had failed to prove damages or loss suffered, if any. He submits that since no damages or loss was suffered by the respondent, the law does not provide for windfall.

35. Mr.Samdhani, learned senior counsel for the respondent on the other

hand placed reliance on some of the minutes of meetings held by the learned arbitrator, application made by the petitioner for re-schedulement of the dates of hearing, application made by the petitioner under sections 12 and 13 of the Arbitration & Conciliation Act, 1996 alleging bias against the learned arbitrator, affidavit in lieu of the examination in chief filed by the witness of the respondent and also various findings recorded by the learned arbitrator in the impugned award. Insofar as the issue of the alleged violation of principles of natural justice raised by the petitioner is concerned, it is submitted by learned senior counsel that the dates of the arbitration meetings were fixed by the learned arbitrator in consultation with both the parties well in advance. He submits that since the petitioner wanted re-schedulement of the dates of the arbitration meetings, the petitioner was under an obligation to comply with the order passed by the learned arbitrator imposing cost upon the petitioner for re-schedulement of the dates of the arbitration meetings.

36. It is submitted that such order imposing cost is passed in the arbitral proceedings in due course and is not unusual with an intention to maintain discipline and to avoid delay in expeditious disposal of the arbitral proceedings. He submits that the order imposing the cost for adjournment was in conformity with the principles of imposing such cost under section 35(B) of the Code of Civil Procedure, 1908. He submits that as a matter of record, the learned arbitrator had not refused the re-schedulement of the arbitration meetings as requested by the petitioner but had infact re-scheduled the meetings however, on the condition that the petitioner pays the cost to the respondent as a condition precedent for such re-schedulement. He submits that imposition of such condition of payment of cost as a condition precedent was in view of the default on the part of the petitioner to remain present on the dates fixed well in advance and did not amount to

prevention of the petitioner from participating in the arbitration proceedings.

37. It is submitted that the petitioner being in default for not complying with the condition imposed by the learned arbitrator cannot be allowed to allege violation of principles of natural justice. He submits that there is no straight jacket formula in so far as compliance with the principles of natural justice is concerned. The Court has to consider in the facts of each case whether any principles of natural justice was violated or not and as to whether any party was seriously affected due to alleged non-compliance of the principles of natural justice.

38. Insofar as the re-schedulement of the dates twice by the learned arbitrator is concerned, it is submitted that there was only a marginal change by the learned arbitrator in the dates of the arbitration meetings to keep the period of arbitration meetings within the same time band. He submits that if the arbitration proceedings are adjourned time and again on one or other ground, the whole purpose of deciding of the arbitration proceedings expeditiously would never be achieved and would be frustrated.

39. It is submitted by the learned senior counsel for the respondent that the learned arbitrator had given two options to the petitioner i.e. to not to ask for any adjournment and to proceed with the arbitration meetings on the original scheduled dates or to pay cost if the dates were required to be re-scheduled on the application of the petitioner. He submits that the petitioner however, did not exercise that option though given by the learned arbitrator. He submits that the petitioner had also filed false and frivolous application under sections 12 and 13 of the Arbitration & Conciliation Act, 1996 making irresponsible allegation of bias against the learned arbitrator which shows the conduct of the petitioner in not

proceeding with the arbitration proceedings expeditiously. He submits that the learned arbitrator in these circumstances, was justified in rejecting the said application filed by the petitioner under sections 12 and 13 of the Arbitration & Conciliation Act, 1996 also.

40. It is submitted by the learned senior counsel for the respondent that even on the re-scheduled dates, the petitioner did not remain present. He submits that the learned arbitrator was good enough to grant one more opportunity to the petitioner to remain present on 24th September, 2013 and had directed the respondent herein to issue a notice to the petitioner. He submits that though the respondent had issued notice to the petitioner to remain present on 24th September, 2013, in compliance with the directions issued by the learned arbitrator, the petitioner chose to remain absent on 24th September, 2013 also. It is submitted by the learned senior counsel that the learned arbitrator was thus justified in the facts and circumstances of these case to proceed with the matter *ex-parte* on the ground that though the petitioner was granted various opportunities to remain present in the arbitration proceedings, the petitioner had deliberately remained absent. He submits that the learned arbitrator has dealt with the written statement filed by the petitioner in the impugned award and has considered the matter on merits and has rightly allowed part of the claims made by the respondent.

41. Learned senior counsel for the respondent placed reliance on the judgment of this Court in case of **Mr.Krishnabhagwan Rajaram Sharma vs. M/s.Tata Motors Finance Limited, (2015) SCC OnLine Bom. 479**, and in particular paragraphs 48 to 53 in support of the submission that if a party has chosen to remain absent inspite of notices served upon him by the learned arbitrator, the learned arbitrator is empowered to proceed with the matter *ex-parte*

and no interference with such *ex-parte* award rendered in such circumstances is permissible under section 34 of the Arbitration & Conciliation Act, 1996.

42. Insofar as the submission of the learned senior counsel for the petitioner that the respondent had not taken any steps to mitigate the alleged loss is concerned, the learned senior counsel for the respondent placed reliance on the affidavit in lieu of examination in chief dated 15th September, 2012 filed by Mr.Yogesh Sadharam Patel, Director of the respondent herein. He submits that in the said affidavit in lieu of examination in chief, the said witness had deposed that he had personally contracted various property brokers and other parties for the purpose of granting the property on leave and license but was unable to find another license. The witness deposed that on 22nd April, 2010, the claimant entered into an agreement with Global Gallarie Motors Private Limited to whom the said premises was granted on leave and license. He submits that a copy of the said agreement dated 22nd April, 2010 was produced by the said witness along with the said affidavit in lieu of examination in chief. He submits that there was no cross-examination of the said witness by the petitioner herein though an opportunity was rendered to the petitioner. He submits that since there was no cross-examination of the witness examined by the respondent, the deposition of the said witness Mr.Yogesh S. Patel remain uncontroverted and was deemed to have been proved.

43. It is submitted by the learned senior counsel for the respondent that insofar as the claim for compensation for locking period awarded by the learned arbitrator is concerned, the learned arbitrator has interpreted the terms of the leave and license agreement which interpretation is a possible interpretation and thus cannot be substituted by another interpretation by this Court.

44. Learned senior counsel produced the proof of fees paid to the learned arbitrator by the respondent and would submit that the learned arbitrator was justified in imposing cost upon the petitioner in the impugned award.

45. Learned senior counsel for the respondent submits that if this Court comes to the conclusion that there was any violation of the principles of natural justice and an opportunity to participate in the arbitration proceedings, including a right to cross-examine is required to be given to the petitioner, in that event, this Court can exercise a power under section 34(4) of the Arbitration & Conciliation Act, 1996 and to adjourn the present proceedings with a view to give an opportunity to the learned arbitrator to resume arbitral proceedings and to take such other action as in the opinion of the learned arbitrator to eliminate the grounds for setting aside the arbitral award.

46. Mr.Kumbhakoni, learned senior counsel for the petitioner in rejoinder invited my attention to the affidavit in lieu of examination in chief filed by the witness of the respondent and submits that since no plea was raised in the statement of claim that during the locking period, the suit premises were lying vacant and thereafter the said premises were given on leave and license to a licensee with whom an agreement was alleged to have been entered into by the respondent, no evidence thereon could be permitted by the learned arbitrator. Learned senior counsel distinguished the judgment of this Court in case of **Krishnabhagwan Rajaram Sharma** (supra) relied upon by the learned senior counsel for the respondent and would submit that in the said matter before this Court, the petitioner was absent on several occasions before the learned arbitrator though notices were served upon him. However, in this case, the petitioner

remained absent only once and that also due to the genuine difficulty faced by the petitioner. He submits that in the said judgment before this Court, the learned arbitrator had not prevented the petitioner from participation in the arbitration proceedings by imposing heavy cost as condition precedent. He submits that in the facts and circumstances of this case, this Court cannot exercise the powers under section 34(4) of the Arbitration & Conciliation Act, 1996.

47. Learned senior counsel for the petitioner submits that since the learned arbitrator had imposed very heavy cost upon the petitioner as condition precedent for seeking re-schedulement of the arbitration meetings though applied for well in advance, such opportunity could not be considered as a reasonable opportunity to the petitioner to present its case. The opportunity given to the petitioner to remain present on 24th September, 2013 also was subject to the compliance of the same condition of payment of cost condition precedent. He submits that the respondent did not deny even before this Court that the respondent had not opposed the application for re-schedulement made by the petitioner before the learned arbitrator without payment of exemplary cost or otherwise.

REASONS & CONCLUSIONS :

48. The question that arises for consideration of this Court is whether the learned arbitrator could have imposed a condition for payment of heavy cost as a condition precedent for allowing the participation of the petitioner in the arbitration proceedings in future or not. Even if the petitioner could not have paid the cost for the re-schedulement of the dates of the arbitration proceedings to the respondent, whether the petitioner was not entitled to even cross-examine the witness examined by the respondent and such order would be in violation of principles of natural justice.

49. There is no dispute that the learned arbitrator had fixed the dates of meeting proposed to be held on 24th to 26th July, 2013 and 1st and 2nd August, 2013 on 17th October, 2012. The learned arbitrator had re-scheduled those dates of hearing on 13th December, 2012 to 29th to 31st July, 2013 and 1st and 2nd August, 2013. On 5th April, 2013, the learned arbitrator once again revised those re-scheduled dates to 30th and 31st July, 2013 and 2nd and 3rd August, 2013. It is also not in dispute that when the respondent had applied for re-schedulement of the dates, the learned arbitrator did not impose any cost condition precedent upon the respondent.

50. A perusal of the order dated 2nd July, 2013 passed by the learned arbitrator indicates that the learned arbitrator adjourned the meetings proposed to be held on 30th and 31st July, 2013 and 2nd and 3rd August, 2013 to 23rd to 27th September, 2013 from 11:00 a.m. to 5:00 p.m. on all days however, on the condition that the petitioner herein pays the cost to the respondent herein i.e. equivalent share of the respondent in the fees of the learned arbitrator for the said hearings, amounting to Rs.3.00 lacs and Rs.60,000/- towards the costs to the respondent in each matter. The learned arbitrator directed the petitioner to pay the said amount on or before 30th July, 2013, making it clear that the payment of cost as awarded by the learned arbitrator shall be a condition precedent for further participation of the petitioner in the said proceedings. The learned arbitrator directed each of the parties to deposit a sum of Rs.3,75,000/- for five hearings fixed in September, 2013 on or before 31st August, 2013. It is not in dispute that the petitioner as well as the respondent had already deposited the fees with the learned arbitrator in respect of those meetings which were fixed by the learned arbitrator for 30th July and 31st July, 2013 and 2nd and 3rd August, 2013.

51. A perusal of the letter dated 11th July, 2013 from the petitioner to the learned arbitrator indicates that in the said letter the petitioner had reiterated that the adjournment was sought by the petitioner on genuine grounds set out in the said application and that also well in advance i.e. more than a month before the scheduled dates of hearing and were not sought at the eleventh hours. The petitioner in the said letter expressed its unwillingness to comply with such unreasonable, penal, harsh, onerous, unfair and unjustifiable condition imposed by the learned arbitrator. It was stated that the petitioner had complied with all earlier directions issued by the learned arbitrator.

52. A perusal of the letter dated 13th July, 2013 issued by the learned arbitrator to the parties, indicates that the learned arbitrator rejected the said application of the petitioner on the ground that it would not be possible for the learned arbitrator to get any other matter fixed on the cancelled dates which he had specifically blocked for those hearings. The learned arbitrator gave two options in the said letter to the petitioner i.e. either to remain present on the dates originally fixed subject to the petitioner communicating his option to the learned arbitrator by 5:00 p.m. on the same day or in the alternate if the original dates were to be cancelled and hearing was to be postponed on the newly fixed dates, the petitioner was bound to comply with the conditions on which cancellation was granted. In the said letter, the learned arbitrator once again directed the payment of cost a condition precedent to the petitioner for further participation in the matter and if the said condition was not complied by the petitioner, it was made clear that the matter shall be proceeded with *ex-parte* and the petitioner would not be permitted to participate further in the matter. It is not in dispute that the said e-mail was sent by the learned arbitrator to the advocate of the petitioner at 10:20 a.m. as well as to

the learned advocate representing the respondent on 13th July, 2013 itself calling upon the petitioner to convey its option by 5 p.m. on the same day.

53. I have perused the application dated 21st June, 2013 filed by the petitioner for seeking re-schedulement of the dates of the arbitration meetings which application was made about 38 days prior to the date of the proposed arbitration meetings. In the said application, the petitioner had brought to the notice of the learned arbitrator that Mr. Jayendra Kachalia, who was the Managing Director of Navnit Motors and was selected by Polaris India Private Limited for his valuable participation at the “Washington calling International Sales Meet” to be held in USA which was being attended by various people across the world and the said meeting could not be re-scheduled at the instance of the petitioner. In the said application, the petitioner requested the learned arbitrator that during the period between 25th July, 2013 to 10th August, 2013, the said witness was constrained to go to USA and would not be available for giving instructions and assistance to the advocate representing the petitioner. The petitioner requested the learned arbitrator to re-schedule the dates of hearing to the suitable dates after 15th August, 2013.

54. It is not the case of the respondent that in the past at any point of time the petitioner had asked for any adjournment on any ground whatsoever. It is not in dispute that at the request of the respondent, the meeting proposed to be held by the learned arbitrator on 5th October, 2012 was postponed to 17th October, 2012 without imposing any cost upon the respondent. It is also not in dispute that the learned arbitrator himself had re-scheduled the dates of the arbitration meetings twice i.e. on 13th December, 2012 and 5th April, 2013. In my view though the learned arbitrator had fixed the dates of the arbitration meeting well in advance, if

there was a genuine difficulty expressed by any of the party in remaining present before the learned arbitrator, the learned arbitrator could not have imposed such harsh and unreasonable condition for payment of exorbitant cost upon the petitioner as a condition precedent for participation of the petitioner in the arbitration proceedings in future.

55. The petitioner had already deposited the fees of the learned arbitrator for arbitration meetings fixed in the month of July and August 2013. Learned senior counsel for the respondent did not controvert the submission made by the learned senior counsel for the petitioner that the application for re-schedulement requested for by the petitioner was not opposed by the respondent or that any demand for imposition of heavy cost was made by the respondent before the learned arbitrator for re-scheduling the dates of the arbitration meetings.

56. Under section 25 of the Arbitration & Conciliation Act, 1996, if a party fails to appear without showing sufficient cause on an oral hearing or to produce documentary evidence, the arbitral tribunal is entitled to continue the proceedings and make the arbitral award on the evidence before it. In my view, in the application dated 21st June, 2013 which was made 38 days prior to the date of the arbitration meeting and for the reasons recorded in the said application, a sufficient cause was made out by the petitioner for seeking re-schedulement of the dates of the arbitration meeting and thus the learned arbitrator could not have imposed such heavy and unreasonable cost upon the petitioner as a condition precedent for participation of the petitioner in further arbitration meetings for non-compliance of such order. The impugned award rendered by the learned arbitrator, in my view, is thus contrary to section 25(c) of the Arbitration & Conciliation Act, 1996 and is very harsh and unreasonable and is *ex-facie* in violation of the

principles of natural justice.

57. In my view such condition imposed by the learned arbitrator upon the petitioner for giving an opportunity as a condition precedent for participation of the petitioner in future arbitration meetings cannot be considered as a reasonable, fair and proper opportunity rendered to the petitioner by the learned arbitrator to represent its case. The learned arbitrator has to treat both the parties equally and has to comply with the principles of natural justice. Since the petitioner was unable to present its case before the learned arbitrator due to such harsh and unreasonable condition imposed by the learned arbitrator with a serious consequence of losing an opportunity to participate in the arbitration proceedings for non-payment of cost, the impugned award deserves to be set aside being in violation of section 34(2)(iii) of the Arbitration & Conciliation Act, 1996.

58. In my view the arbitral proceedings have to be conducted by the learned arbitrator in co-operation with both the parties and by giving proper opportunities to meet the case to each party. Similarly parties also have to co-operate with each other and the learned arbitrator in expeditious disposal of the arbitration proceedings. The petitioner had not applied for any adjournment or for re-schedulement of the dates of arbitration meeting at any time in past. The option given to the petitioner by the learned arbitrator either to communicate its decision whether the petitioner had accepted the option of appearing before the learned arbitrator on the originally fixed dates by 5:00 O'clock on the same day itself was harsh and unreasonable. The said e-mail was sent by the learned arbitrator to the learned advocate representing the petitioner. Be that as it may, the condition imposed by the learned arbitrator being very harsh and unreasonable, the petitioner could not comply with such harsh and unreasonable condition.

59. In my view, even if the petitioner could not have paid the cost as awarded by the learned arbitrator in favour of the respondent, the learned arbitrator could not have stopped the petitioner from participating in the arbitration proceedings for the purpose of cross-examination of the witness examined by the respondent or otherwise. The learned arbitrator could have awarded reasonable amount of cost in the final award. The learned arbitrator has as a matter of record has awarded such cost in favour of the respondent in the final award.

60. The Supreme Court in case of **Modula India** (supra) has held that no oral testimony can be considered satisfactory or valid unless it is tested by cross-examination. The right of the defence to cross-examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon. It is held that though the defence of the tenant had been struck out, there was nothing in a law to preclude him from demonstrating to the Court that the plaintiff's witnesses were not speaking the truth or that the evidence put forward by the plaintiff was not sufficient to fulfill the terms of the statute. The Division Bench of this Court in case of **Sheshrao Raibhan Ingale** (supra) has followed the judgment of the Supreme court in case of **Modula India** (supra) and has taken a similar view.

61. In my view, since the learned arbitrator had refused to grant a reasonable and proper opportunity to the petitioner to participate and to cross-examine the witness examined by the respondent, the learned arbitrator could not have relied upon the affidavit in lieu of examination in chief filed by the respondent for allowing the claim of the respondent on the ground that the

evidence of the witness of the respondent stood uncontroverted and was proved. The impugned award is in violation of the principles of law laid down by the Supreme Court in case of **Modula India** (supra) and the judgment of the Division Bench of this Court in case of **Sheshrao Raibhan Ingale** (supra) which are squarely applicable to the facts of this case. I am respectfully bound by the said judgments.

62. The Supreme Court in case of **Sanjeev Kumar Jain** (supra) has dealt with sections 35-A and 35-B of the Code of Civil Procedure, 1908 and has also dealt with section 31(8) of the Arbitration & Conciliation Act, 1996 and has held that the cost awarded by the arbitral tribunal cannot be actual expenditure but can be reasonable cost. In my view, the impugned order passed by the learned arbitrator to bear the cost of contribution made by the respondent towards fees of the learned arbitrator and in addition to that additional cost of Rs.60,000/- for re-schedulement of the dates of the arbitration meeting was not a reasonable cost and is contrary to the principles laid down by the Supreme Court in case of **Sanjeev Kumar Jain** (supra).

63. Insofar as the claim for compensation awarded by the learned arbitrator in the impugned award for locking period is concerned, a perusal of the record clearly indicates that in the statement of claim the respondent had not pleaded about the steps, if any, taken in mitigating the loss during the said locking period. It was also not pleaded by the respondent in the statement of claim that during the said locking period, the suit premises were lying vacant or that the said premises could be given on leave and license by the respondent only after the expiry of locking period. The Supreme Court in case of **Murlidhar Chiranjilal** (supra) has held that a person who claims damages, a duty is imposed on such

party to take reasonable steps to mitigate the loss consequent on the breach and if such steps are not taken, it debars him from claiming any part of damages which is due to his negligent to take such steps to mitigate the loss.

64. In my view, since the respondent failed to take any steps to mitigate the alleged loss suffered by the respondent even during the said locking period, the respondent could not have been awarded the said claim for compensation without such pleading and proof. In my view, the learned arbitrator could not have allowed the respondent to lead evidence beyond the pleadings filed by the respondent. The impugned award is liable to be set aside on this ground also.

65. The Supreme Court in case of ***Kailash Nath Associates*** (supra), this Court in case of ***Mithalal B. Gurjar*** (supra), in case of ***Star India Private Limited*** (supra) has held that proof of loss or damage is not dispensed with under section 74 of the Indian Contract Act. If a party has not proved the loss suffered, he cannot be awarded claim for compensation. In my view since the respondent failed to prove the actual loss suffered during the locking period, the learned arbitrator could not have allowed the said claim of compensation. The principles of law laid down by the Supreme Court in case of ***Kailash Nath Associates*** (supra) and the principles of law laid down by this Court in case of ***Mithalal B. Gurjar*** (supra) and ***Star India Private Limited*** (supra) clearly applies to the facts of this case. I am respectfully bound by the said judgments.

66. The Delhi High Court in case of ***Tower Vision India Private Limited*** (supra) has considered the similar issue in case of locking period in a leave and license agreement and has held that if the licensor has not taken a reasonable steps to minimize the loss, he is not entitled to claim any compensation during the

locking period. In my view, the judgment of the Delhi High Court in case of ***Tower Vision India Private Limited*** (supra) applies to the facts of this case. I am in respectful agreement with the views expressed by the Delhi High Court in the said judgment.

67. Insofar as the judgment of this Court in case of ***Krishnabhagwan Rajaram Sharma*** (supra) relied upon by Mr.Samdhani, learned senior counsel for the respondent is concerned, a perusal of the said judgment indicates that the petitioner in that case was absent on several dates of hearing before the learned arbitrator though was served without any sufficient cause. In the facts and circumstances of that case, this Court accordingly held that since the petitioner therein had chosen to remain absent deliberately without any sufficient cause though several opportunities were rendered by the learned arbitrator, the petitioner could not have been allowed to cause unnecessary delay in the arbitral proceedings and could not be shown any indulgence by this Court under section 34 of the Arbitration & Conciliation Act, 1996. The facts before this Court in the said judgment are totally different and are clearly distinguishable in the facts and circumstances of this case. The said judgment of this Court relied upon by the learned senior counsel for the respondent would not assist the case of the respondent.

68. Insofar as decision of the learned arbitrator on the application filed by the petitioner under sections 12 and 13 of the Arbitration Act is concerned, since the impugned award is being set aside on the other grounds raised by the petitioner, I do not propose to decide the issue as to whether the said application filed by the petitioner under sections 12 and 13 of the Arbitration Act was rightly rejected or not.

69. Insofar as submission of the learned senior counsel for the respondent that if this court comes to the conclusion that the principles of natural justice was violated by the learned arbitrator, these two petitions can be adjourned with an opportunity to the learned arbitrator to resume the proceedings and to eliminate the ground of challenge under section 34 is concerned, I am not inclined to accept this submission of the learned senior counsel for the respondent. In my view this is not the fit case for passing any order under section 34(4) of the Arbitration Act in view of the petitioner having lost faith in the learned arbitrator and even otherwise in the facts of this case, no order under section 34(4) can be passed by this court.

70. The Division Bench of this court in case of ***Ashapura Minechem Ltd. vs. Pacific Basin Handymax (UK) Ltd.*** delivered on 24th January, 2013 in Appeal(L) No.764 of 2012 in Notice of Motion No.3430 of 2011 in Arbitration Petition No.24 of 2010 has held that the learned trial judge could not have passed an order thereby striking of the defence for non-compliance of an order of cost by the appellant therein on the ground that the said order was harsh and unreasonable. In my view in this case the learned arbitrator has prevented the petitioner from participating in the arbitral proceedings on the ground that the petitioner had not complied with the payment of cost awarded by the learned arbitrator. In my view, the impugned order passed by the learned arbitrator is totally harsh, unjust, unreasonable and arbitrary. The principles laid down by the judgment of this court in case of ***Ashapura Minechem Ltd.*** (supra) squarely applies to the facts of this case. In my view the impugned award ex-facie shows gross violation of principles of natural justice and cannot be sustained.

72. I therefore, pass the following order :-

- a). Arbitration Petition Nos.556 of 2014 and 680 of 2014 are allowed in terms of prayer clause (a). The impugned awards dated 24th September, 2013 passed by the learned arbitrator are set aside.
- b). No order as to costs.

[R.D. DHANUKA, J.]