

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 656 OF 2019

Star Track Fasteners Private Limited,)
a company, registered under the)
Companies Act, 1956 and having its office)
address at 40, K.M.Stone, G.T.Road Bahalgarh)
(Village Asawarpur), Sonapat,)
Haryana – 131 021) Petitioner

VERSUS

Union of India,)
through Dy.Chief Engineer (C), P.Way,)
Office of the C.A.O. (Const.), 1st Floor,)
Station Building, Churchgate,)
Mumbai – 400 020) Respondent

Mr.Aman Rungta, a/w. Ms.Aziza Khatri, Ms.Radhika Vyas, i/b.
M/s.AAK Legal for the Petitioner.

Mr.Chetan C.Agrawal a/w. Ms.Jyoti Agrawal for the Respondent.

CORAM : R.D. DHANUKA, J.

DATE : 31st JULY, 2019

ORAL JUDGMENT:-

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the award dated 22nd February, 2019 passed by the learned arbitrator rejecting the substantial part of the claim made by the petitioner. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The respondent had invited tender for manufacture and supply of grooved rubber sole plates in the year 2012. The petitioner had submitted its bid in response to the said invitation. The bid of the

petitioner was found favourable. The petitioner was accordingly issued purchase order by the respondent on 22nd October, 2012. Under the said purchase order, the goods were to be supplied by the petitioner by 23rd June, 2013. Clause 0702 provides for recovery of liquidated damages by the respondent in case of delay at sum equivalent to 2 % of the price of any stores.

3. It was the case of the petitioner that due to various reasons not attributed to the petitioner and more particularly delay on account of the plant shifting as per the advice of the RDSO as well as the electricity outages at the plant of the kneader machine which was a machine for rubber compounding and due to delay on the part of the respondent partly, the petitioner could not supply the material within the stipulated period of completion of delivery i.e. on or before 23rd June, 2013.

4. The petitioner applied for extension of time for delivery with a request not to levy liquidated damages. The respondent granted extension four times however making it clear that the same would be subject to levy of liquidated damages.

5. The respondent deducted approximately a sum of Rs.10,81,050/- from the bills of the petitioner towards the liquidated damages. The petitioner applied for refund of the said amount which was not made by the respondent. The dispute arose between the parties. The

petitioner invoked the arbitration agreement recorded in clause 2900 of the contract entered into between the parties. In addition to the amount for refund of liquidated damages deducted by the respondent, the petitioner made various other claims. The Deputy General Manager of the respondent however by letter dated 7th May,2018 while appointing the learned arbitrator mentioned in the letter of appointment that the terms of the reference to the arbitrator in the matter was Claim No. 1 'Token penalty of Rs.2,000/- per month from 23rd June,2013 to 31st December,2013 and with full liquidated damages for extension of delivery period and PVC upto Original D.P. i.e. 23rd June, 2013' to the extent of the amount of Rs.10,81,050/-. By the said letter the learned arbitrator was requested to decide the arbitrability of each claim referred for arbitration and to declare item-wise reasoned award as per clause no. 2900 of IRS condition of contract applicable to the contract.

6. The petitioner thereafter made a claim before the learned arbitrator for recovery of an amount of Rs.33,03,026/- with interest at the rate of 24% per annum and cost quantified at Rs. 2 lacs. The said statement of claim was resisted by the respondent filed by the statement of defence.

7. The learned arbitrator however in the meeting held on 25th July, 2018 directed the petitioner to restrict its claim to the tune of Rs.10.81 lacs in terms of the reference dated 7th August,2018. The petitioner

accordingly restricted the claim to Rs.11,91,328/- with interest.

8. Insofar as the claim made by the petitioner for refund of liquidated damage from the bills of the petitioner is concerned, it was the case of the petitioner before the learned arbitrator that the delay was not attributable on the part of the petitioner. In any event, the respondent could not have deducted the amount towards the liquidated damages from the petitioner's bill on the ground that the respondent had not suffered any loss or damages arising out of the delay in supplying the material under the contract awarded to the petitioner. The petitioner also relied upon number of judgments before the learned arbitrator.

9. Learned counsel for the petitioner invited my attention to some of the correspondence annexed to the compilation of documents forming part of the record before the learned arbitrator, various directions issued by the learned arbitrator, order of reference made by the respondent and some of the findings rendered by the learned arbitrator in the arbitral award.

10. It is submitted by the learned counsel that in the statement of defence filed by the respondent before the learned arbitrator, it was not the case of the respondent that the clause of the contract providing for recovery of the liquidated damages recorded that such damages was pre-estimate and genuine loss that would be suffered by the respondent

due to delay on the part of the petitioner in supplying the material. He submits that it was specifically pleaded by the petitioner that no loss was suffered by the respondent. In the statement of defence filed by the respondent however it was the case of the respondent that the respondent was not required to prove any such loss due to delay caused by the petitioner in supply of material. The respondent sought to justify the deduction made from the bills of the petitioner on the ground that the respondent was entitled to recover the liquidated damages from the bill of the petitioner in view of the delay caused by the petitioner under the provisions of the contract.

11. Learned counsel for the petitioner invited my attention to the findings rendered by the learned arbitrator insofar as claim for refund of amount recovered by way of liquidated damages by the respondent is concerned. He submits that the learned arbitrator has rejected the substantial part of the claim on the ground that the respondent was entitled to recover such liquidated damages from the bills of the petitioner under clause 0702 and was not required to prove any loss suffered by the respondent for recovery of the said amount.

12. Insofar as the claim for interest made by the petitioner is concerned, learned arbitrator rejected the said claim for the period prior to the date of award on the ground that the said claim was not referred to the learned arbitrator. Learned counsel submits that there is no bar

under the provisions of the contract for payment of interest. The learned arbitrator was empowered to consider the claim for interest under section 31(7) (a) of the Arbitration and Conciliation Act, 1996. He submits that the award shows patent illegality.

13. Learned counsel placed reliance on the judgment of this court in case of ***Union of India vs. M/s.Motor & General Sales Ltd., 2016 SCC OnLine Bom 6787*** and in particular paragraphs 5, 8 to 18 and would submit that in the similar facts and circumstances, this court after adverting to the judgment of the Hon'ble Supreme Court in case of ***Kailash Nath Associates vs. Delhi Development Authority*** decided on 9th January, 2015 in ***Civil Appeal No.193 of 2015*** and judgment of this court in case of ***B.E.Bilimoria & Co.Ltd. vs. Raheja Universal Private Ltd., (2015) SCC OnLine Bom.5614*** and in case of ***Hindustan Petroleum Corporation Limited vs. Offshore Infrastructure Limited in Arbitration Petition No.869 of 2012***, has upheld the award of the learned arbitrator allowing the claim for refund of amount deducted from bills of the contractor towards liquidated damages made by the employer towards the liquidated damages without any actual loss being suffered.

14. Mr. Agrawal, learned counsel appearing for the respondent on the other hand submits that delay was attributable on the part of the petitioner and under clause 0702 of the contract, the respondent was

entitled to recover the liquidated damages. He submits that while granting extension of time at the request of the petitioner, the respondent had made it clear that the extension was though granted was subject to the payment of liquidated damages. Learned counsel however could not dispute that it was not the case of the respondent that any loss was suffered by the respondent due of delay in supplying the material by the petitioner.

15. A perusal of record indicates that the petitioner had demanded a larger amount from the respondent. The respondent however in the order of reference dated 7th May,2018 while appointing an arbitrator restricted the reference in respect of the penalty amount restricted to the sum of Rs.10,81,050/-. The learned arbitrator accordingly directed the petitioner to reduce the amount from the statement of claim and to restrict the claim of the extent of Rs.10,81,050/-.

16. Learned counsel appearing for the respondent could not dispute that since the claim was higher than the sum of Rs.10,81,050/-, though the learned Deputy General Manager had restricted Rs.10,81,050/-, the petitioner could make successive reference in arbitration in respect of the balance claim. In my view, the respondent thus could not have restricted the dispute only in respect of Rs.10,81,050/-, when the claim was for larger amount. Be that as it may, it is clear that the petitioner would be entitled to apply for successive reference in respect of the

balance amount which was directed to be deleted from the statement of claim by the learned arbitrator in view of the restricted order of reference dated 7th May, 2018.

17. Insofar as claim for refund of the amount deducted towards the liquidated damages is concerned, though the respondent while granting extension of time to the petitioner had made it clear that the extension was granted subject to the payment of liquidated damages, the fact remains that the clause permitting the respondent to levy liquidated damages in case of delay does not indicate that the quantum mentioned in the said clause was pre-estimated, genuine and reasonable loss that would be suffered by the respondent in the event of any delay on the part of the petitioner. The case of the petitioner was very specific before the learned arbitrator that even if such clause permitted the respondent to levy the liquidated damages, since no loss was suffered by the respondent, no such amount could be recovered from the petitioner. A perusal of the statement of defence filed by the respondent clearly indicates that it was not the case of the respondent that any loss was suffered by the respondent due to such delay on the part of the petitioner in supplying the material.

18. A perusal of the award clearly indicates that the learned arbitrator has rejected the substantial part of the claim only on the ground that clause clause 0702 permitted the respondent to recover the

liquidated damages and on the ground that the respondent was not required to prove any such loss suffered by the respondent, if any, due to delay on the part of the petitioner if any in supplying material.

19. This court in case of ***Union of India*** (supra) after adverting to the judgment of Hon'ble Supreme Court in case of ***Kailash Nath Associates*** (supra), judgment of this court in case of ***Hindustan Petroleum Corporation Limited*** (supra) and in case of ***B.E.Bilimoria & Co.Ltd.*** (supra) has categorically held that there could not be levy of liquidated damages by the employer, when no loss was suffered or proved. The principles laid down by the Hon'ble Supreme Court in case of ***Kailash Nath Associates*** (supra) and by this court in case of ***Hindustan Petroleum Corporation Limited*** (supra) and in case of ***B.E.Bilimoria & Co.Ltd.*** (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment.

20. Insofar as claim for interest for the period prior to the date of award is concerned, the learned arbitrator has though allowed the claim in the sum of Rs.2,28,166/- has rejected the claim for the period prior to the date of award on the ground that the reference to the learned arbitrator by the respondent was restricted to the principal amount only. Learned counsel appearing for the respondent could not dispute that there was no bar under the provisions of contract from making a claim for interest on the amount due or against the learned arbitrator from

awarding any interest. Under section 31(7) (a) of the Arbitration and Conciliation Act, 1996, the Arbitral Tribunal is empowered to award interest at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which cause of action arose and the date on which the award is made unless otherwise agreed by the parties. Since there is no bar under the contract entered into between the parties for payment of interest, under section 31(7)(a), the learned arbitrator was empowered to award interest from the date of accrual of cause of action till payment and/or realisation. The rejection of the claim for interest for the period prior to the date of award is contrary to Section 31(7)(a) and shows patent illegality in the impugned award.

21. Though, this court is of the view that the award shows patent illegality in rejecting the substantial part of the claim made by the petitioner, in view of the principles of law laid down in the judgment of Hon'ble Supreme Court in case of ***McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors., (2006) 11 SCC 181*** this court cannot allow the claim which is rejected by the learned arbitrator. This court cannot correct errors made by the learned arbitrator. Court either can set aside the award or can uphold the award or in appropriate case, modify the award if such part is severable.

22. I therefore pass the following order :-

- (a) Arbitral award dated 22nd February, 2017 made by the learned arbitrator is set aside. In the facts of this, the petitioner would be at liberty to invoke the arbitration agreement again for the entire claim which was subject matter of the original statement of the claim filed by the petitioner.
- (b) Arbitration petition is allowed on the aforesaid terms.
- (c) There shall be no order as to costs.

[R.D. DHANUKA, J.]