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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ O.M.P. (COMM) 351/2018 & IAs 10663-64-65/2018 & CAV
725/2018
M/S SHOREWALA GLOBAL INDUSTRIES PVT. LTD.

..... Petitioner

Through: Mr.Ravi Gupta, Sr. Adv. with Mr.Jai
Sahai Endlaw, Mr.Apoorva Vijn &
Mr.Shivansh Soni, Advs.

versus

M/S RAJINDER MITTAL CONSTRUCTION CO. PVT. LTD.

..... Respondent

Through: Mr.Anil Seth, Mr.Parv Garg &
Mr.Udit Seth, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER
14.08.2018

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CAV 725/2018

As the learned counsel for the respondent appears on advance notice,
the Caveat stands discharged.

IA No. 10664/2018 (Exemption)

Allowed, subject to all just exceptions.

IA No. 10665/2018

This is an application seeking condonation of a day's delay in filing of
the petition.

For the reasons stated in the application, the delay is condoned and
the application stands allowed.

O.M.P. (COMM) 351/2018 & IA No. 10663/2018

This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 24.04.2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Agreement dated 22.07.2004 whereby the work of construction of Industrial Building at Plot No. SP2-6, RIICO Industrial Estate, Neemrana Distt. Alwar, Rajasthan was awarded by the petitioner to the respondent.

The disputes between the parties are in relation to the claim of the respondent for payment outstanding for the work done by it for the petitioner. The petitioner had set up a defence of making payment to the suppliers of the construction material on behalf of the respondent and had submitted that if the said payments made directly to the suppliers are taken into account, no further amount is due and payable by the petitioner to the respondent and infact, the petitioner has overpaid to the respondent, for which a Counter Claim was also filed.

The learned Arbitrator, in his Impugned Award has rejected the submission of the petitioner *inter alia* observing as under:-

“The respondent was given several opportunities to produce those suppliers whose bills were filed and denied by the claimant to prove that the material was brought for this construction on instruction of claimant at site but respondent after taking several opportunities adjournment which took approximately about more than one year but could not produce. These bills even do not have surprisingly the Mobile number or any other number of those suppliers and the respondent even did not have those numbers. The claimant has been raising this claim and demanding the amount of balance and even

arbitration was claimed on 03.09.2007 (Exhibit DW1/C1), the respondent did not take any step or even when the arbitration commenced to trace out those suppliers. It is only during in proceeding when respondent was to produce their witnesses that the respondent moved the application to serve them through court. Giving the name of these suppliers in list of witness could not suffice when the same has been seriously contested by claimant.

Furthermore, there is no authorisation letter received from claimant to make the payments while just recording in books of such huge amount of several crores of rupees by respondent in their account book is not acceptable that too in building account and not adjusted amount payable to claimant. The respondent has failed to prove that in fact they had got the material by purchasing from those suppliers through claimant and adjusted the same in builders account. The onus was upon the respondent to prove that how much material was supplied by them in the light of admitted oral understanding as arrived.”

Learned senior counsel for the petitioner submits that the Arbitrator has erred in passing of the Impugned Award as he has not taken note of Clause 9(b) of the Letter of Acceptance dated 17.06.2004 which makes it obligatory for the respondent to maintain the record of all material brought to the site. He further places reliance on Clause 5.1 of the General Condition of Contract which obliges the respondent to store all material at the site at its own cost and risk. Reliance is also placed on Clause 5.5.2 of the General Condition of Contract which again makes it obligatory for the respondent to maintain a record of all material brought to site. He submits that the respondent had failed to produce any such record in support of its claim before the Sole Arbitrator and therefore, the claim of the respondent could not have been granted.

It is further contended by the learned senior counsel for the petitioner that during the execution of the work and in fact, at the stage of payment of the first interim bill, the employee of the Architect had instructed the petitioner to make payment of 20% of the certified amount to the respondent and 80% of the certified amount directly to the suppliers of the material. He submits that in accordance with this instruction, the petitioner has been making payment with respect to all interim bills raised by the respondent. He submits that the respondent has also never protested against the same or raised any claim of any amount remaining outstanding against the petitioner.

I have considered the submission made by the learned senior counsel for the petitioner, however, I find no merit in the same. Though it is correct that the respondent was to maintain complete records of all the material brought by it to the site, it is not the case of the petitioner that it called upon the respondent to produce its books of accounts and the respondent refused to produce the same. Infact, the dispute raised by the petitioner, as noted above, was only that it was the petitioner who had made the payment for the material brought at site at the behest and calling of the respondent. It was therefore, for the petitioner to prove any such understanding between the parties as also the fact that it had made any payment to any third party supplier at the behest of the respondent. The petitioner having failed to produce any such evidence, the Arbitrator has rightly rejected its defence and disbelieved the same.

In fact, even this handwritten note of the employee of the Architect directing the bifurcation of the payment in the ratio of 20:80 was also disbelieved by the Arbitrator as having not been proved. This being a matter of appreciation of the evidence led by the parties before the Arbitrator and

the view taken by the Arbitrator not being unreasonable or perverse in the opinion of this Court, cannot be interfered with in exercise of power under Section 34 of the Act.

Learned senior counsel for the petitioner has further challenged the rate of interest awarded in favour of the respondent. The Arbitrator, in the Impugned Award has awarded interest @ 10% p.a. in favour of the respondent from the date of filing of the Statement of Claim till the payment of the awarded sum, which the learned senior counsel for the petitioner claims to be exorbitant and unreasonable.

I have considered the submission of the learned senior counsel for the petitioner and find no merit in the same. As recorded in the Impugned Award, the respondent had claimed interest @ 18% p.a., however, the Arbitral Tribunal while rejecting the same stated as under:

“There is no term for payment of interest the arbitral Tribunal after considering the present rate of interest and circumstances allows 10 per cent interest per annum which rate of interest the tribunal consider reasonable on amount awarded to claimant from the date of filing of the statement of claim before the Tribunal till actual payment.”

The Arbitrator having exercised its discretion in terms of Section 31(7)(a) of the Act, which cannot be stated to be unreasonable, there is no merit in the objection raised by the learned senior counsel for the petitioner.

In view of the above, I find no merit in the present petition. The same is dismissed, with no order as to cost.

NAVIN CHAWLA, J

AUGUST 14, 2018/rv