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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 305 OF 2019
WITH
NOTICE OF MOTION NO. 567 OF 2019
IN
ARBITRATION PETITION NO. 305 OF 2019

Schindler India Pvt. Ltd.

...Petitioner/
Applicant

V/s.

Heritage River Journeys Pvt. Ltd.

...Respondent

Ms. Shilpa Kapil for the Petitioner/Applicant.

Mr. Gauraj Shah i/by Ms. Neha Mehta for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 11TH SEPTEMBER, 2019.

P.C. :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short "the Arbitration Act"), the petitioner prays for setting aside the arbitral award dated 29th October, 2018 passed by the learned arbitrator directing the petitioner to pay a sum of Rs.14,17,500/- with 12% p.a. interest from the date of 19th March, 2015 till the date of institution of claim and *pendente-lite* and also rejecting the counter claim filed by the petitioner against the respondent.

2. The petitioner was awarded a contract on 1st July, 2014 for installation of elevator on the terms and conditions mentioned therein. The said contract was superseded by another contract dated

19th November, 2014. Under the said contract awarded by the petitioner to the respondent, the respondent paid an amount of Rs.14,17,500/-. It is the case of the respondent that since the petitioner did not fulfill its part of obligation under the contract, the respondent terminated the contract by a notice dated 19th March, 2015. The petitioner thereafter issued a letter on 21st March, 2015 to the respondent alleging that the material had arrived on 28th February, 2015 and requesting the respondent to inform about the location of shifting so that the same could be installed. Since the petitioner did not refund the amount paid by the respondent, dispute was referred to arbitration, pursuant to an order passed by this Court in Arbitration Application No.243 of 2016.

3. The petitioner resisted the claim filed by the respondent and also filed the counter claim before the learned arbitrator. Learned arbitrator allowed the claim made by the respondent and rejected the counter claim filed by the petitioner.

4. Ms.Shilpa Kapil, learned counsel appearing for the petitioner invited my attention to some of the clauses of the second agreement entered into between the parties and more particularly clauses 4, 6, 7(C) and 11 and would submit that the respondent had vide notice dated 19th March, 2015 only terminated the first contract. She submits that though the respondent had admittedly not terminated the second contract, learned arbitrator has allowed the entire claim made by the respondent though the second contract even according to the respondent was alive and not terminated.

5. The next submission of the learned counsel is that even under clause 11 of the second contract entered into between the parties, even in the event of termination, the petitioner was entitled to recover various amounts and more particularly in this case for the material supplied by the petitioner. He submits that the petitioner had already kept the entire material ready required for the purpose of installation. Learned arbitrator however, has decided contrary to clause 11 of the second contract and has allowed the claims made by the respondent without considering the claim of the petitioner for the materials kept ready by the petitioner for installation of elevator.

6. Learned counsel for the petitioner submits that the respondent was not ready for installation and was delaying with the matter and thus the findings rendered by the learned arbitrator ignoring these facts deserves interference by this Court under section 34 of the Arbitration Act.

7. Mr. Shah, learned counsel appearing for the respondent on the other hand invited my attention to the documents annexed to the petition and also part of compilation and would submit that the learned arbitrator has considered the evidence produced by both the parties in the impugned award and has rightly held that the time was an essence of contract. The petitioner was not ready with the material on the stipulated date provided in the contract. He invited my attention to the findings rendered by the learned arbitrator in

paragraphs 44 to 49 of the impugned award and would submit that the learned arbitrator has rendered various findings of fact that since the petitioner had not kept the material ready required for installation elevators before 23rd February, 2015, the petitioner could not press clause 7(C) of the second contract in service. It is further found by the learned arbitrator that the petitioner had forgotten/omitted to communicate the dispatch of the materials for the dumbwaiter till they received the termination letter dated 19th March, 2015, which was a serious abdication of their duties in view of the urgency of the installation.

8. Learned counsel for the petitioner in rejoinder reiterated the submission that the findings rendered by the learned arbitrator being perverse, deserves interference by this Court under section 34 of the Arbitration Act.

9. Insofar as the first submission of the learned counsel for the petitioner that though the respondent had terminated only the first contract and not the second contract, the learned arbitrator could not have awarded any claim in favour of the respondent is concerned, it is not in dispute that the first contract was already superseded by the second contract in all respects and the second contract was the only contract in existence prior to the date of termination of the contract in existence. Merely because in the notice of termination, the respondent has referred to the date of the first contract, would not advance the case of the petitioner. In my view, the learned arbitrator

rightly rejected this hyper technical contention raised by the petitioner in the impugned award.

10. Insofar as the submission of the learned counsel for the petitioner that even if the contract was terminated under clause 11 of the second contract, the petitioner was entitled to the cost of material brought at site by the petitioner for the purpose of installation of elevator is concerned, in my view, the learned arbitrator after considering the evidence produced has held that the petitioner was not ready with the material prior to the due date for supplying the material at site for the purpose of installation of elevator. Learned arbitrator has rightly held that the time was an essence of contract and thus the petitioner not being ready with the material on the due date, cannot press his service clause 7(C) of the second contract. Learned arbitrator while rendering such finding has also rightly interpreted clause 7(C) of the second contract entered into between the parties.

11. I do not find any infirmity in the impugned award rendered by the learned arbitrator. The findings rendered by the learned arbitrator are based on appreciation of oral as well as documentary evidence and not being perverse, cannot be interfered with by this Court under section 34 of the Arbitration Act.

12. Learned arbitrator has rightly held that the petitioner had not proved before the learned arbitrator that prior to the date of

termination, the material was kept ready for the purpose of installation of the elevator.

13. In my view, the petition is devoid of merit and is accordingly dismissed.

14. In view of dismissal of the Arbitration Petition No.305 of 2019, Notice of Motion No.567 of 2019 for stay does not survive and is accordingly dismissed. There shall be no order as to costs.

(R.D. DHANUKA, J.)