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

ARBITRATION PETITION NO.470 OF 2019

Villayati Ram Mittal Pvt. Ltd.	...Petitioner
V/s.	
Schindler India Pvt. Ltd.	...Respondent

WITH
NOTICE OF MOTION NO.1372 OF 2019
IN
ARBITRATION PETITION NO.470 OF 2019

Villayati Ram Mittal Pvt. Ltd.	...Applicant
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IN THE MATTER BETWEEN :

Villayati Ram Mittal Pvt. Ltd.	...Petitioner
V/s.	
Schindler India Pvt. Ltd.	...Respondent

Mr.Piyush Raheja with Suchita R. Tiwari and Mr.Saurabh Pakale for
the Petitioner / Applicant.

Mr.Chirag Modi with Ms.Ruchi Garg and Ms.Saloni Shah i/b DSK
Legal for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 14TH AUGUST, 2019.

P.C. :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996,(for short "the Arbitration Act") the petitioner has impugned the arbitral award dated 30th November, 2018 passed by the learned arbitrator thereby allowing part of the claim made by the respondent (original claimant) thereby directing the petitioner to pay a sum of Rs.6,50,816/- along with interest at the rate of 18% p.a.

by 15th January, 2012 and awarding costs of Rs.22,00,000/- and dismissing the counter claim filed by the petitioner.

2. The respondent was awarded the contract for the purpose of supply, installation and commission of two elevators at the construction site of the petitioner.

3. It was the case of the respondent that the respondent has completed physical installation of the said elevators before 31st December, 2011 but could not complete testing and commissioning work since the petitioner was not completing its part of obligation and to allow the respondent to complete the process of testing and commissioning.

4. It is not in dispute that the petitioner has already paid about 80% payment to the respondent under the said contract entered into between the parties. Insofar as the balance 20% payment is concerned, the petitioner refused to pay the said amount on the ground that the respondent had failed to install elevators and also failed to carry out the test and commission the elevators.

5. Dispute arose between the parties. The respondent issued a notice invoking arbitration agreement. The claim was denied by the petitioner. In an application filed under section 11 of the Arbitration Act filed by the respondent against the petitioner, this Court appointed the learned arbitrator.

6. Both the parties led oral as well as documentary evidence before the learned arbitrator. Learned arbitrator framed eight points for determination insofar as the claims made by the respondent is concerned and framed point no.9 insofar as counter claim filed by the petitioner is concerned.

7. Mr.Raheja, learned counsel for the petitioner invited my attention to some of the portions of the cross-examination of two witnesses examined by the respondent as CW-1 and CW-2 and also invited my attention to some of the paragraphs of the pleadings filed by the respondent before the learned arbitrator and would submit that though it was the case of the respondent that the respondent had already installed the elevators and though such plea was inconsistent with the oral evidence led by the witnesses of the respondent, the learned arbitrator allowed the claim for balance amount payable under the said contract. The learned arbitrator rendered a finding that the respondent failed to prove installation of the elevators. In support of this submission, learned counsel invited my attention to the questions in the cross-examination to CW-1 i.e. question nos.38 and 41 and the evidence of CW-2 and more particularly question nos.21 and 27.

8. It is submitted by the learned counsel that since there was variation in the evidence of the two witnesses examined by the respondent, the learned arbitrator could not have allowed the claim

made by the respondent.

9. Learned counsel invited my attention to the affidavit in reply filed by the respondent to the counter claim filed by the petitioner and would submit that even in the reply to the counter claim, it was the false case of the respondent that the elevators were already installed.

10. The next submission of the learned counsel for the petitioner is that though there was no contract entered into between the petitioner and the respondent, the petitioner was impleaded as a party respondent in the arbitral proceedings. Learned counsel fairly admitted that the petitioner did not raise this issue before the learned arbitrator at any stage or before this Court in the application filed by the respondent under section 11 of the Arbitration Act. He submits that however, since this being question of law and goes to the root of the matter, his client is entitled to raise this issue in this petition filed under section 34 of the Arbitration Act.

11. Mr.Modi, learned counsel for the respondent on the other hand insofar as the issue of jurisdiction raised by the petitioner is concerned, would submit that the notice invoking arbitration agreement was issued by the respondent to the petitioner. The said notice was responded to by the petitioner through an advocate. Even at that stage, no such objection was raised. He submits that in the arbitration application filed by the respondent under section 11 of the

Arbitration Act also, the petitioner did not raise any such objection.

12. It is submitted by the learned counsel that in the statement of claim, the respondent had pleaded the existence of the arbitration agreement between the parties. It was not denied by the petitioner in the written statement. He submits that the petitioner on the other hand had filed a counter claim against the respondent arising out of the said agreement entered into between the parties invoking the same arbitration agreement under the said agreement. He submits that in view of this position, the arbitration agreement can be even otherwise construed under section 7(4)(c) of the Arbitration Act. He submits that it would also amount to waiver under section 7(4) of the Arbitration Act on the part of the petitioner.

13. Insofar as the submission of the learned counsel for the petitioner that there were averments in the statement of claim filed by the respondent and oral evidence of the two witnesses examined by the respondent that installation of elevators was done by the respondent is concerned, it is submitted that the learned arbitrator has considered the entire evidence led by both the parties and has rendered various findings of fact which being not perverse, cannot be interfered with by this Court under section 34 of the Arbitration Act.

14. Insofar as the issue of jurisdiction raised by Mr. Raheja, learned counsel for the petitioner is concerned, a perusal of the record clearly indicates that the notice invoking arbitration agreement

was issued by the respondent upon the petitioner. The said notice was responded by the petitioner. In the said reply by the petitioner, it was contended that various payments in respect of the contract were made by the petitioner to the respondent. The petitioner made a demand for refund of the said amount from the respondent.

15. Mr.Raheja, learned counsel for the petitioner could not deny that in the statement of claim the arbitration agreement was asserted by the respondent and was not denied by the petitioner. It is not in dispute that the petitioner also had demanded substantial relief by filing a counter claim against the respondent invoking the same arbitration agreement. It was not the case of the petitioner that the said counter claim was without jurisdiction before the learned arbitrator. No such plea is raised even in the arbitration petition. In my view, since the arbitration agreement was asserted in the statement of claim and not denied by the respondent in the written statement, in view of section 7(4)(c) of the Arbitration Act, this agreement would fall under section 7(4)(c) of the Arbitration Act also.

16. The petitioner has not having raised the issue of existence of the arbitration agreement at any stage, it would amount to waiver under section 4 of the Arbitration Act and thus cannot be allowed to be raised for the first time across the bar in this petition filed under section 34 of the Arbitration Act. There is thus no substance in this submission made by the learned counsel for the petitioner.

17. Insofar as the submission of Mr.Raheja, learned counsel for the petitioner that there was variation in the statement of claim, affidavit in reply to the counter claim and the evidence led by the two witnesses of the respondent is concerned, a perusal of the award clearly indicates that the learned arbitrator has appreciated the evidence not only of the witnesses examined by the respondent but also the witnesses examined by the petitioner. Though it was pleaded by the respondent in the statement of claim that the respondent had already installed the elevators, the learned arbitrator has not accepted the said case of the respondent in toto but has allowed the claim on the premise that the respondent had supplied the material and had completed its part of obligation under the contract for payment of claim of balance 20%. There is no dispute that the petitioner had already made payment of 80% to the respondent.

18. Learned arbitrator has rendered a finding that the petitioner had not complied with its part of obligation and created a situation by which the respondent could not commission and carry out testing of the elevators. The findings rendered by the learned arbitrator are based on appreciation of evidence led by both the parties. The findings rendered by the learned arbitrator are not perverse and thus cannot be interfered with by this Court under section 34 of the Arbitration Act.

19. In my view, the petition is devoid of merit and is accordingly dismissed with costs quantified at Rs.25,000/- which shall

be paid by the petitioner to the respondent within one week from today.

20. In view of dismissal of the arbitration petition, Notice of Motion No.1372 of 2019 does not survive and is accordingly dismissed.

(R.D. DHANUKA, J.)