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

ARBITRATION PETITION NO.845 OF 2012
WITH
ARBITRATION PETITION NO.173 OF 2012

The Municipal Corporation of Greater Mumbai	–	Petitioner
V/s.		
M/s. Uran Shipyard Pvt. Ltd.	–	Respondent

Mr. Kevick Setalwad, Sr.Adv. a/w. H.C. Pimple,I/b. R.A. Malandkar Adv. for the Petitioner, BMC.

Harshad Trivedi, Adv. a/w. S.N. Chataule, Respondent.

CORAM : MRS. ROSHAN DALVI, J.

DATE OF RESERVING THE JUDGMENT : 18th December, 2013

DATE OF PRONOUNCING THE JUDGMENT : 24th December, 2013

J U D G M E N T

1. Both these Petitions are filed by the Municipal Corporation of Greater Mumbai, (MMC) against the Respondent who was the contracting party with the MMC challenging two separate awards which came to be passed upon the arbitration that took place between the parties pursuant to the dispute between them under contract entered into by and between them.

2. The MMC issued a tender for plying ferry boat services on Build, Own, and Operate basis (BOOT) between Marve and Manori creek. The Respondent's tender was accepted upon certain terms and conditions which constitute the contract between the parties. The Respondents were to ply two ferry boats. They were to get them

manufactured tailor made to the specifications required for such ferry services at the specific place. The Respondents were to be paid certain compensation and were allowed to charge certain rates to the passengers for ferrying the boats. The rates were to be increased if there was an increase in fuel prices. The Respondents were to undertake the specified minimum ferry services each day. They were to provide alternative boat if their ferry boats could not be plied. The Respondents had to license boat and keep the license renewed from time to time. They had to pay government levies (for failure of which penalty were charged). The contract was for period of 15 years from 1st June, 2001 to 17th June, 2016. For breach of any of the conditions by the Respondent the contract could be terminated. The relevant terms and conditions of their contract run thus :

10. In the event of failure of one boat, the successful tenderer will deploy <u>alternative boat</u> to avoid the hampering of the schedule.

19. Periodic statutory inspections, renewal of <u>licences</u>, <u>certificates</u> etc. will be the sole responsibility of the contractor. He shall submit the copies of relevant documents after inspections and renewal to the MCGM for record.

27. The contract will be terminated on breach of any contract condition or on the occurrence any of the following events.

(i) At the completion of contract period.

(ii) In the event, the contractor becomes insolvent and assigns its assets including the interest in the boats under the benefits of the creditors or his adjudged insolvent, payment due to the contractor or MCGM in such events shall be upto the date this contract is terminated provided that upto the date of such termination, the boat was used for operation.

(iii) If the <u>performance</u> of the contractor is considered by the MCGM as <u>unsatisfactory</u> or not upto the Maritime standards and the contractor fails to improve his performance upto the standards as required by the MCGM.

(iv) If the contractor assigns its rights and obligations under this contract and / or contractor assigns its rights, title and

interest in the boat without prior written consent of MCGM.

38. No change in compensation / royalty amount will be allowed during the contract period under any circumstances.

The ticket fare specified in the tender are the <u>rates prevailing with the current fuel prices</u> and the same will remain in operation. The successful tenderer will not be allowed to increase in the fare of tickets <u>except there is the revision in the fuel prices</u>. The ticket <u>fare will be revised by Municipal Authorities in case of any change in the prices of fuel</u>. However, the contractor will request the Municipal Authority with justification regarding their claim in revision of ticket fare. The ticket fares shall be revised from the date of approval from the Statutory Authorities / Chief Port Officer Maharashtra Marine Board.

The contractor shall submit the detailed rate analysis for revision of ticket fare for approval. After the approval of ticket fare by Municipal Authorities, it will be the responsibility of the Contractor to get the revised fares concurred from the statutory authorities i.e. Chief Port Officer Maharashtra Marine Board.

Till such revision of rates, successful tenderer will continue to render the uninterrupted services of the ferry boat at the prevailing rates.

39. <u>Penalty</u> The successful tenderers will perform the minimum 52 to and fro trips per day as per the timing given in the annexure – B.

<u>For failure to perform</u> a to & fro trip in the period from 5.15 am to 11 am and 5 pm to 24 hours midnight an amount of Rs.400.00 per trip and for remaining period an amount of Rs.200/- shall be remitted by the contractors in Municipal Treasury. If, contractor do not remit the penalty amount before 10th day of the next month, the amount shall be deducted from the contractor's deposit without any reference to the contractor.

Delay in deployment of newly built boat will attract a penalty of Rs.500/- per day of delay.

49. In the event, the boat remains inoperative for whatsoever reason for a period exceeding 30 days at a stretch, the contractor shall provide a <u>substitute boat</u> immediately thereafter, failing which, the MCGM reserves the right to terminate the contract by giving 30 days written notice besides having the right to encash the security deposit.

3. The contract was executed in 2001. The Respondent

invested substantial amounts for construction of the ferry boats made to specifications. It was required in the creek where one side was sandy and on other side was rocky. The ferry boat was to carry 100 passengers, 2 light motor cycle, 8 two wheelers, 2 auto rickshaws and luggage per trip. The ferry services would be from 5.15 am to 12.00 mid-night each day. The schedule was specified between the parties.

4. There have been various obstacles in the work of the Respondent. The diesel price was raised after the execution of the contract. (Judicial notice is required to be taken of this fact and which has been done by the learned Arbitrator also.) No rise in the prices of tickets of the passengers has been allowed to the Respondent throughout the length of the contract period. Though the MMC would compensate the Respondent for the amount specified in the contract, the amount earned by the Respondent could not meet the expenses of the boats which were specifically made for the contract. Since the tickets fare was not revised as per term 38 of the contract, the Respondent fell in arrears of certain passengers levies which were government levies payable and were delayed in renewing licenses and obtaining permission of the Maharashtra Maritime Board. The boats came to be damaged due to excessive user beyond capacity which repairs could not be carried out for quite some time because a birthing facility was not provided and one side of the creek was rocky necessitating repairs to be carried out only during the low tide period. The Respondents were to provide substitute boat under clause 49 which came to be provided by EsselWorld which had its own boats in the area.

5. Whereas the MMC completely failed to consider and wholly ignored its obligation for revision of prices under clause 38, it called upon the Respondent to perform its obligations under clauses 10, 19, and 49 of the contract.

6. The Respondent claimed compensation for the loss suffered due to refusal to increase the ticket fares commensurate with the fuel price hike. An award has come to be passed by Justice H. Suresh in favour of the Respondent for Rs.67 lacs. The award is not challenged, but not complied.

7. Alongside the default of the MMC with regard to the payment sought by the Respondent, the MMC sought to enforce compliance of the other terms of the contract from the Respondent which could not be complied largely in view of the MMC's own default.

8. The MMC terminated the contract upon certain stated breaches.

9. The Respondent challenged the termination as invalid and illegal and called upon the MMC to specifically perform the contract under the work order dated 18th June, 2001 which was claimed to be valid and subsisting and binding between the parties. The parties also adjudicated their dispute in arbitration before Mr. Justice Halbe who passed award upon the claim raised by the Respondent herein with regard to the termination of the contract by the MMC. Justice Halbe declared the notice of termination of the MMC dated 27th August, 2008 terminating contract retrospectively from 18th November, 2007 as illegal, invalid and incapable of taking effect. That done, the contract / work order subsisted and hence it is not stated even by the Arbitrator that it would have to be specifically performed by both the parties as per its terms. (MMC has challenged both these awards.)

10. It must first be appreciated that an Arbitrator can follow any procedure and is not be bound by rules of the Civil Procedure Code and Indian Evidence Act. The parties have essentially relied upon the correspondence between them which the learned Arbitrator considered whilst determining whether the notice of termination was

validly given and can be enforced. The Respondent contended that it was arbitrary, vindictive and without an opportunity of hearing. It was not given by the officer authorised to issued such notice. The notice could not have been given in view of the seminal breach of the MMC itself in not raising ticket prices despite the hike in fuel prices. The ticket prices remained Rs.1 to Rs.2.50 and the passengers levy tax was Rs.0.25 for ticket. The Respondent showed how for the trips undertaken by the Respondent which were 52 per ferry boat per day (104 for both the boats) it would consume diesel of 400 ltrs. and hence requested ticket price hike since 18th February, 2005.

11. Of course, the Respondent also contended that the local residents were inimical to the Respondents since the beginning and did not want the ferry services. Certain persons who are supporters of ShivSena political party and the local ShivSena Corporator also wanted to bring any another contractor. These persons continuously obstructed the smooth functioning of the ferry. The Respondent also contended that they transported persons free of cost at the time of Ganpati festival for immersion. This became a routine so that for 5 years continuously the Respondent was made to transport a large number of persons beyond the capacity of the boats which consequently damaged the boats. The Respondent got repaired the boats only with difficulty in view of the rocky terrain. The Respondent suffered loss and damage. Of course, these are not the obstacles for which MMC could held liable. The learned Arbitrator has fairly considered that those would tantamount to breaches of the Respondent despite the contract to continue.

12. The Respondent failed to pay certain passenger levy and to get the boat surveyed by the Maharashtra Maritime Board and get necessary licenses issued in time.

13. However the Respondent contended throughout in the

correspondence that if the Respondent is sufficiently paid commensurate with the fuel hike as per Clause 38 of the contract and the compensation which the MMC was to pay to the Respondent as per clause 35 of the contract the Respondent would be in a position to carry out each of its obligations. This the learned Arbitrator has fully considered. This would tantamount the consideration of the reciprocal promises of the two contracting parties on merits. In fact the learned Arbitrator also considered that in certain Writ Petition of the Respondent against certain Fishermen Society, the Society was restrained from carrying out trawlers business of ferrying passengers and interfering with the Respondent's ferry service. Under the Writ Petition the Respondent was even allowed to extend the jetty and the society members were restrained from parking their trawlers near the jetty. The MMC nevertheless allowed certain Koli society to ply alternative services.

14. The MMC claimed that it was constrained to do so because the Respondent did not ply the ferry services continuously, regularly and uninterruptedly as required under clause 33 of the contract contract. The Respondent has shown that it has made an arrangement with EsselWorld to provide its boats which were plied by the Respondent as alternative service. This has not been denied by the MMC. The MMC has contended that it got EsselWorld to provide the alternative services. However, the permission was asked for by the Respondent and granted to the Respondent for such service and hence the learned Arbitrator has rightly concluded that the Respondent could not be taken to have defaulted on that score.

15. It is, therefore, seen from the admitted correspondence that the Respondent did not ply the ferry services with full charges which were authorised under the contract. The rates were highly subsidized. The Respondent was compensated. That was only

towards part of the expenses to be incurred. There was fuel hike within two years of the contract. The Respondent continuously requested the MMC for hike in ticket rates or requested MMC to make payments itself which was not done. The Respondent, therefore, fell in arrears of passenger levy taxes. The Respondent's boats were damaged and could not be repaired in time. Yet the Respondent obtained the survey and the license, albeit belatedly. The Respondent also arranged for alternative transport in the boats of EsselWorld. In fact the MMC gave the contract for temporary period to a Koli society.

16. The reading of the entire correspondence would show that the parties have reciprocal obligations. The seminal obligation was the payment of the price for each journey in the boats in which the Respondent had invested a fortune. Despite the specific agreement in that behalf, which would even be otherwise implied, the fuel prices were not hiked. This led to disaster. The learned Arbitrator had, therefore, rightly and justly seen where the seminal fault lies.

17. It is argued on behalf of the MMC that a reading of the award shows a number of breaches of the Respondent. Once these breaches are seen and accepted by the Arbitrator and that part of the award is not challenged by the Respondent, the notice of termination must be held to be validly given. That would be a superficial shallow approach to judging the merits of the case of the contracting parties whose obligations depended upon the reciprocal obligations of the other contracting party. It is precisely this which the learned Arbitrator would be required to appreciate and which has been done. Judicial notice is required to be taken of the fact that the diesel prices would rise at least biennially. Even if the contract does not make any provision for the hike in ticket price commensurate with the diesel prices, it would be imputed upon the parties and enforced by the Court. It is unfortunate that the local body such as MMC which levies

taxes and fees for various services, and which are also increased from time to time, does not appreciate the matters of such increase and its effect upon the smooth functioning of the contract. It would be disservice to the people of the city that the Municipal Corporation is enjoined to serve, if it allows such a state of affairs to continue resulting in the contractor being unable to carry out its obligations to provide the ferry services. In fact it would reflect on the MMC which is enjoined to provide such amenities to the populace.

18. It is surprisingly argued on behalf of the MMC that under Clause 38 the revision in the ticket fare depending upon the fuel price would be only upon a request to the Municipal authorities being made with the justification regarding the revision of the ticket fare and that too by a detailed rate analysis for the revision of such fare to be submitted for approval. It is contended that there was no such submission by the Respondent. It is unfortunate that such an argument is made in the face of correspondence of long years in a number of letters where a similar request and demand is made. The only revision of the ticket fare that could be made would be to grant the Respondent the return upon the increased fuel price. No detailed rate analysis is required for such revision upon admitted fuel price hike. That would be required in case where the ticket fares would require revision upon other justification and not only fuel prices hike specified in the clause itself.

19. Upon such case of the parties the learned Arbitrator had to decide whether the notice of termination was validly given. The MMC issued three show cause notices prior to the notice of termination. The first notice was issued on 29th October, 2007. The MMC alleged breach of condition 49 of the contract. It alleged that the substitute boat was not provided when the Respondent's boats were not in operation. On 2nd November, 2007 the Respondent replied to the

notice and stated how for five years they supplied boats for Ganpati Festival free of cost to unmanageable crowds who damaged the boats. The boats had to be repaired which work is not completed. The letter shows that one Mr. Ambrose ran another ferry service. The MMC issued second show cause notice on 19th November, 2007 under clause 19 of the contract and alleged that the Respondent has not renewed license of the Maharashtra Maritime Board and got the boats surveyed as safe. On 15th March, 2008 it issued third show cause notice alleging breach of conditions 10 and 49 for providing substitute ferry boats upon failure to have the ferry service uninterruptedly by the Respondent. The Respondent gave a detailed reply on 25th March, 2008. It inter-alia mentioned about diesel price hike which was not reimbursed by way of increase in ticket rates. It stated about the loan which could not be repaid as it was operating at a loss. It also stated that the award upon its first claim though not challenged was not also honoured and if the award amount was released it would make payment of the necessary passengers levy, repair work and renewal of license. Of course, it also mentions about the opposition from various sections and other people for which the MMC could not be held responsible.

20. Despite these the Respondent carried out a survey of the ferry and informed that they were launching their vessels under their letter dated 31st July, 2008. Soon thereafter and without any fresh cause the MMC terminated the contract under its letters of termination dated 27th August, 2008. This was retrospectively with effect from 18th November, 2007. It is this notice of termination which is came up for challenge and which has been considered in arbitration.

21. This court has failed to understand the importance of the date 18th November, 2007. It is after the first show cause notice and

before the second show cause notice. There was nothing exceptional about that date. In fact the third show cause notice has been issued thereafter and despite showing the various difficulties and obstacles the Respondent has obtained the necessary license upon the survey and notified that they were scheduled two launch their vessels duly repaired, surveyed and licensed. This was the most inopportune time for termination. The time itself shows the vindictiveness and perversity. It shows that whilst the Respondent was trying to make ends meet in its contractual obligations and whilst it provided temporary services in EsselWorld boats, the MMC would not let it continue when it had surpassed its obstacles despite of odds and despite the fact that the Respondent has not paid them the legitimate dues under first award.

22. The learned Arbitrator has rightly considered that what transpired before the show cause notice leading to the termination is, therefore, unnecessary to consider. In fact the reading of the correspondence shows the futility of its verbosity in corresponding as also the attempt at arguments which could not carry the case of MMC any further. Having seen that whatever be the earlier defaults – and indeed the defaults on the part of the Respondent were dependent upon the MMC's default – and despite which the Respondent beat the odds, it is clear that there was neither any justification in terminating the contract nor also in making it retrospectively from a day without meaning.

23. The Respondent was required to be heard if several pleas of the Respondent stated in the correspondence were to be considered for terminating the contract by a public body such as the MMC. This was also not done. The Respondent has not been heard about why the contract could not be terminated after they had put their house in order. The Respondent has also not been heard upon why it would be

terminated from an earlier inexplicable date.

24. The learned Arbitrator has, therefore, rightly considered that the notice of termination was invalid and cannot be acted upon. The other claims of the Respondent would fall as matter of corollary. The contract would subsist and both parties would be obliged to honour their respective obligations therein.

25. Despite the award passed by Justice Suresh not having been challenged, the MMC did not comply. The Respondent was forced to have it executed which it did. In execution the MMC raised an even more perverse claim for the first time. It sought to be a judge on his own cause. It claimed and deducted an amount of Rs.18 lacs of the award from Rs.67 lacs as and by way of penalty under clause 39. It claimed that there was failure to perform the obligation of having the minimum number of trips each day and claimed to penalize the Respondent for not providing the ferry service. The executing Court passed an order by consent of the parties referring the matter relating to the justification of levying the penalty to Justice Halble, who was the Arbitrator in the dispute relating to termination of the contract.

26. Justice Halbe once again heard the parties and passed his award with regard to the justification of the penalty on 13th July, 2011 holding that the MMC had no authority to deduct the amount of penalty of Rs.18,46,000/- and that they must pay that amount with 15% interest from the date of the award of the Justice Suresh (dated 20th August, 2007) till payment as awarded by Justice Suresh with the costs of the arbitration.

27. This has been challenged by the MMC in Arbitration Petition No.173 of 2012. Whilst hearing that challenge the Single Judge of this Court has opined that the learned Arbitrator did not decide the issue which was referred to him about the justification for levying the penalty but only in manner of recovery and hence

remanded the arbitration for determination of the entitlement and justification under section 34 (4) of the Arbitration and Conciliation Act, 1996. Justice Halbe heard the parties, considered the evidence and passed yet another award on 28th March, 2013 which has now been challenged before the Court. That was not challenged in the Petition. The Petition is not amended. Nevertheless upon the arguments of the MMC such challenge is also considered.

28. The awards relating to the justification of penalty would have to be seen in view of the aforesaid disputes between the parties. It is conceded by both counsel that the background of the dispute would be material to see. It may be mentioned that the background of the dispute was present to the mind of Arbitrator and has been considered by the Arbitrator which is reflected in his award.

29. This Court would require now to see whether the last award dated 28th March, 2013 suffers from any vice. It is argued by both counsel that award which now must be considered is the award which relates to justification and entitlement to levy penalty under clause 39 of the contract.

30. The Respondent was to have 104 ferry services each day and night between 5.15 a.m. to midnight. The Respondent indeed did not provide ferry services on certain dates. The MMC could charge the penalty only for specific services not provided. It is for the MMC to prove which were the specified dates when ferry services not provided or the whole length of period that the MMC claimed that it was not provided. The MMC claimed that it was not provided for 5 years without any particulars. The claim for five years is otherwise barred of limitation which the Arbitrator has considered and which, it appears, the MMC has conceded. It is for the MMC to provide the specific particulars as to the ferry services not provided. That has not been done. The Respondent contended that the resistance from the

local residents and sabotage by others as stated above were the obstacles in their way. They also contended that the ticket fares were not affordable to enable them to have the boats repaired, surveyed and licensed strictly as per the terms of the contract. If they were reimbursed the prices which they were entitled to or otherwise compensated, the MMC would then have a right to point a finger at the Respondent. The learned Arbitrator has considered as an important fact the extent of the loss upon such difference in such additional rates not being granted.

31. The aforesaid correspondence shows and the learned Arbitrator has considered that until the issue of aforesaid three show cause notices for terminating the contract, the MMC had not breathed a syllable about the penalty it was entitled to or it might propose to charge. It was only after the award was passed that in order to delay payment of the award the penalty bogey was raised. The learned Arbitrator has considered that even if the ferry services were suspended – which was only due to agitation of the Fishermen Society who prevented the operation of the ferry services – that there was no slightest attempt on the part of the MMC to impose penalty. In fact the learned Arbitrator has also considered from the evidence that till the termination of the contract there was no resistance from the villagers for operation of ferry services. The Arbitrator has considered the order passed in the Writ Petition of the Respondent against the Fishermen society and the award of Justice Suresh and the admitted correspondence between the parties. The claim for the period of five years was, therefore, rightly held untenable. The learned Arbitrator has considered various periods of suspension of ferry services claimed by the MMC out of which four periods were prior to the first award. Even in that award no claim or counter claim was raised about the earlier four suspensions.

32. The learned Arbitrator has also rightly and justly considered the conduct of the MMC at other times during the contractual period. At one time it sought to bail out the Respondent from the penalty imposed by Maharashtra Maritime Board for Rs.84 lacs. It also did not enforce and invoke a bank guarantee. A strange letter, but which calls the bluff of the MMC dated 1st October, 2007, after the passing of the first award of Justice Suresh has been rightly referred to by the learned Arbitrator. In that letter the MMC referred to the award and called upon the Respondent to confirm whether it will continue with the contract uninterruptedly till the end of the contract period. The letter was not without prejudice. Hence it was with prejudice. It would show that the MMC wanted the contract to continue and did not want to impose the penalty. It, in fact, abandoned its claim of imposing penalty under penalty clause. The learned Arbitrator has also seen an otherwise innocuous early letter of the MMC dated 20th May, 2003 which showed that it held the Respondent in high esteem. The learned Arbitrator has also considered the intrinsic evidence with regard to the Esselworld providing the substitute services though MMC claimed that it was under its aegis. The learned Arbitrator saw that it was in fact because of the good offices of the Respondent and the cordial relations which he enjoined with EssellWorld.

33. The learned Arbitrator has rightly considered that these aspects show that the MMC did not want to penalize the Respondent and in fact did not desire to impose or enforce the penalty clause.

34. The learned Arbitrator has considered the legal position of with regard to the waiver by a party by long participation and acquiescence in the law of evidence and the judgments of this Court.

35. What is waiver explained in Halsbury Laws of England, Vol.16(2), 4th Edn., Para 907 and reproduced in the case of ***Babulal***

Badriprasad Varma Vs. Surat Municipal Corporation & Ors., (2008) 12 Supreme Court Cases 401 is worth a note which runs thus :

> ***The expression `waiver' may, in law, bear different meanings. The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may arise from a party making an election, for example whether or not to exercise a contractual right.... Waiver may also be by virtue of equitable or promissory estoppel; unlike waiver arising from an election, no question arises of any particular knowledge on the part of the person making the representation, and the estoppel may be suspensory only.... Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver, but mere acts of indulgence will not amount to waiver; nor may a party benefit from the waiver unless he has altered his position in reliance on it.***

36. The aspect of implied waiver has held contracting parties to perform their obligations since the earliest times. In the case of ***Bruner V. Moore, 1903 B 1535*** the Defendant granted an option to the Plaintiff to purchase certain rights of invention of his product, sewing machines, within six months from the date of the agreement. The Plaintiff exercised the option and claimed two months extension of contract. The parties agreed to meet to be granted the extension. The contractual period of six months had expired by then. The Defendant refused to carry out the option as it was exercised outside the contractual period. The evidence showed that the option was kept open till the end of the calender month. By the post contractual communication, the Plaintiff was held entitled to the option upon such implied waiver of the contractual period by the Defendant.

37. The conclusion of the learned Arbitrator that the imposing of penalty was wholly unjustified is correct.

38. In the result it is seen that the notice of termination is correctly held to be invalid. The contract between the parties and the first award of Justice Suresh dated 20th August, 2007 shall have to be complied or executed. Both awards are, therefore, wholly correct and do not call for any interference.

39. Both Petitions are dismissed with costs of Rs.50,000/-.

(ROSHAN DALVI, J.)