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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.433 OF 2014

Municipal Corporation of Greater Mumbai ...Petitioner

vs

Walter Bau-AG (IL) ...Respondent

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Mr. Kevic Setalvad, Senior Advocate, a/w. Mr. Anupam Surve and Mr. R.Y. Sirsikar, for the Petitioner/MCGM.

Mr. Zal Andhyarujina, a/w. Mr. Hursh Meghani, Mr. Javed Gaya and Ms. Vidya Chaudhari, i/b. Chambers of Javed Gaya, for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: 31 OCTOBER, 2017

JUDGEMENT :

. This Arbitration Petition challenges an award passed by an arbitral tribunal of three arbitrators. The disputes between the parties arise out of the contract of “construction and completion of Bombay Sewage Project, Worli and Bandra outfalls” awarded by the Petitioner herein to the Respondent contractor. The Respondent was the claimant before the arbitral tribunal. By the impugned award dated 6 August 2013, the majority of the arbitrators awarded the Respondent's claim aggregating to INR 20,42,24,167/- and DM 6,71,465/- with interest in the event of failure to pay the sum within twelve weeks and costs of arbitration quantified at Rs. 20 lakhs.

2. The contract was awarded by the Petitioner to the

Respondent in pursuance of an invitation to tender in the year 1995. The project was with financial assistance from the World Bank, and tenders were invited globally. The contract was awarded to a German Company named Dyckerhoff & Widmann AG ("D&W"). On 2 October 1995, D&W commenced the work. The stipulated date for completion was 15 March 1999. Time was, however, extended by the Petitioner. In the meantime, on 1 January 2000, all its contracts outside Europe were transferred by D&W to its subsidiary, Dywidag International GmbH ("Dywidag"). This transfer was under an agreement titled as "contribution agreement" dated 22 March 2000. On 30 March 2001, the contract work was completed by Dywidag and taken over by the Petitioner. Subsequently, on or about 17 January 2001, D&W merged with Walter Bau-AG, the present Respondent ("WB"). On or about 27 May 2003, the extended defect liability period ended. On or about 22 July 2003, a draft final bill was submitted by the contractor. By a communication dated 26 September 2003, the Engineer conveyed extension of time without any damages and invited the contractor to give details of compensatory costs. Thereafter, on or about 31 October 2004, the services of the Engineer appointed for the project were terminated by the Petitioner and one of the latter's own employees was appointed as 'Engineer'. The appointment was protested by the contractor in the name of D&W. On or about 4 March 2006, the last of the decisions given by the Engineer was conveyed by the Petitioner to D&W in respect of the Draft Final Bill submitted by/on behalf of D&W on 22 July 2003, communicating inter alia its disagreement with the claims of D&W originally recommended by the Engineer. These particular claims of D&W were thereupon referred to an arbitral tribunal comprising of three

arbitrators. The award resulting from the reference was set aside under Section 34 of the Arbitration and Conciliation Act, 1996 by a learned Single Judge of this Court. That order is a subject matter of challenge in a pending appeal. In the meantime, on 24 October, 2009, Dywidag submitted a comprehensive draft final statement in the name of D&W to the Engineer inter alia setting out its claims. Since there was no certificate or payment, on 2 February 2010, it issued a notice of arbitration. The notice was issued by Dywidag, acting on behalf of WB, the legal successor of the original contractor D&W. The present arbitration reference was held in pursuance of this notice, where the impugned award came to be passed. By the time the reference commenced, an Insolvency Administrator had come to be appointed of WB, which had filed for insolvency in 2005. The Insolvency Administrator appointed Dywidag under a power of attorney to represent it in the reference.

3. Mr. Setalvad, learned Senior Counsel for the Petitioner, raises the following two main contentions in support of his challenge to the impugned award:

(i) Firstly, learned Counsel submits that there is no arbitration agreement between WB, who invoked the arbitration clause and was the claimant before the arbitral tribunal, and the Petitioner, and the tribunal accordingly lacked the jurisdiction to hear the reference and make the award. Learned Counsel submits that though D&W were the original contracting party, there was an assignment of the contract in favour of Dywidag as per the claimant itself; WB, who claims to be the successor

of D&W, thus, had no right to invoke the arbitration agreement between the Petitioner and D&W or make any claim thereunder. It is submitted that if the contract had stood assigned to Dywidag, the succession as between D&W and WB does not vest any right under the contract to the latter. It is submitted that the arbitration reference filed by the Insolvency Administrator of WB was accordingly not maintainable.

(ii) Secondly, learned Counsel submits that the claims of the Respondent, WB, are all hopelessly time-barred. It is submitted that the 'Taking-over Certificate' was issued by the Petitioner on 31 May, 2001, taking over the project with effect from 30 March, 2001; the Defects Liability Certificate, issued on 13 June, 2003, certified the end of Defects Liability Period with effect from 27 May, 2003. In the premises, learned Counsel submits, the Draft Final Statement (which, under the contract, was to be submitted not later than 56 days after the issue of Defects Liability Certificate) having been submitted on 24 October, 2009, and the arbitration notice having been issued in pursuance thereof on 2 February, 2010, the reference is clearly barred by the law of limitation.

4. The first ground of challenge, which involves the locus of WB to invoke the arbitration agreement and the corresponding jurisdiction of the arbitrators to decide the disputes, essentially raises the question of legal succession. Can WB be said to be the legal successor of the contractor? Any arbitration clause is in its nature assignable. If the underlying contract can be, and stands, assigned, there is no reason why an arbitration agreement forming part of it cannot or would not. As held by the Supreme Court in **Khardah Company Ltd. vs. Raymon & Co.**

(India) Private Limited.¹, the arbitration clause follows the assignment of the contract. As we examine the facts of the present case to consider the issue of assignment, it needs to be noted at the outset that the Respondent did not dispute before the arbitrators, or indeed in the present challenge, that WB was the legal successor of D&W, the original contractor. Both D&W and WB were entities based in Germany and have, after following the legal procedure prescribed under the German Law, merged with each other with effect from 17 May, 2001. D&W, the original contractor, thus, merged its identity with WB – the merged company. The contract between the parties accepts such legal succession. Cl. 1.1(a)(ii) of the Agreement defines “contractor” to include *inter alia* the legal successor in title to the person whose tender has been accepted by the Employer. The legality of the succession between D&W and WB must be assessed, as held by the Supreme Court in the case of **Technip SA vs. SMS Holding (P) Ltd.**², with reference to the law of the land in which the company has its domicile, namely, Germany. The arbitrators have come to a definitive conclusion, based on the secondary evidence of the documents of succession placed before them, that WB was the legal successor of D&W and the Insolvency Administrator of WB had the power to pursue the claims and the arbitration.

5. The Petitioner's contention before the arbitral Tribunal was that though the original contract was with D&W, it was Dywidag which took over the contract, and as such, the contract could not form the

¹ AIR 1962 Supreme Court 1810 (V 49 C 251)

² (2005) 5 Supreme Court Cases 465

property of D&W and hence, WB could not succeed to it. The answer given by the arbitrators to this argument is plain and simple. It is the Petitioner's own case that it never gave its consent to the assignment of the contract by D&W to Dywidag; the legal effect would, therefore, be that the contract remained with D&W and its ownership was never transferred to Dywidag. If that is so, WB is entitled to succeed to this contract as an admitted legal successor of D&W. The arbitrators observed that it was the Petitioner who always raised an objection to the claim of Dywidag to have been the successor of D&W on the basis of want of the Employer's consent; in its own arbitration petitions filed from the earlier arbitration reference before the three-member arbitral tribunal, the Petitioner impleaded WB as the successor in interest of the original contractor, D&W. It could not now take a total somersault and claim that the contract stood assigned to, or was taken over by, Dywidag. The tribunal, accordingly, held that WB, through its Insolvency Administrator, was the rightful claimant before the tribunal.

6. No fault can be found with the reasoning of the tribunal. The sequence of events, material from this standpoint, clearly supports the claimant's case. The contract work was completed by the original contractor, D&W, on 30 March, 2001. That was the date of the take over by the Employer. Thereafter, on 17 May, 2001, D&W merged with WB. On 21 August, 2001, the Petitioner was given complete information about the merger. Dywidag came in by virtue of a document titled as "Contribution Agreement" as of 22 March, 2000 between D&W and itself. By this Contribution Agreement, all contracts outside Europe were transferred by D&W to Dywidag, which was but a subsidiary of D&W.

The Contribution Agreement itself acknowledged and recognised that the assignment of any particular contract would be subject to the consent of any third party, who might be affected by such assignment. The assignment was, thus, a contingent contract so far as the present contract is concerned. The contingency clearly failed, since the consent of the Employer (i.e. the Petitioner) never came, and the assignment, thus, could not take effect. The assignment was never accepted by the Petitioner, who continued to hold D&W liable for the contract. The Petitioner cannot possibly contend that want of its consent to the assignment implies that the original contractor continues to be bound and liable thereunder so far as the Employer is concerned, but not entitled to enforce the contract by the reason of the same assignment and only the assignee could enforce the same. If the original contractor, D&W, remained bound and liable under the contract and thus, entitled to enforce it, no exception can be taken to the entitlement of WB thereunder.

7. The judgement of our Court in the case of **DLF Power Limited vs. Mangalore Refinery & Petrochemicals Limited**³, relied upon by Mr. Setalvad, does not help the Petitioner. That was a case where the contract stood assigned, and with it the arbitration agreement forming part of it, to a third party. In the present case the assignment between D&W and Dywidag was contingent on its acceptance by the Petitioner and since, that did not come about, the contract continued to be the property of the original contractors, namely, D&W and upon merger between the contractor and the merged company could be

³ Arbp509-11, dated 20 July, 2016, Coram : R.D. Dhanuka, J.

enforced by the latter.

8. Coming now to the issue of limitation, the majority arbitrators' reasoning for holding in favour of the contractor may be outlined thus : (a) Sub-clauses 60.9 to 60.14 of the contract, which bear on the subject, imply that the agreement between the parties was to keep open all rights and obligations under the contract till a stage was reached where all disputes were resolved and settled; the documents produced before the tribunal showed that that stage was never reached; (b) it was clear from the evidence on record that both parties to the contract consented to the waiver of the requirement of clause 60.10 of the contract for submission of the statement at completion within the meaning of clause 60.10 within the originally stipulated period; the statement submitted under clause 60.11, calling it a draft final bill, on 22 July, 2003, was, thus, in order; (c) the procedure to be followed upon submission of a statement under clause 60.11, namely, consultation between the contractor and the Engineer so as to reach the stage of an agreement on the sums to be paid to the contractor and the sums on which there was a dispute, was not completed till March 2006; it was only in March 2006 that the contractor and the Engineer could be said to have reached an agreement upon the sums claimed by the contractor under the draft final bill, though there still were two outstanding issues, which came in the way of submission of a final statement, namely, (i) appointment of its employee as 'Engineer' by the Petitioner and (ii) three pending disputes before the earlier arbitral tribunal concerning interim payments. These disputes were resolved only when awards were delivered by the earlier arbitral tribunal on the three disputes; and

accordingly, the final statement submitted on 24 October, 2009 and invocation of the reference on 2 February, 2010 were both within time.

9. The arbitrators' reasoning and conclusion on this issue represent a fair and reasonable view on the subject. The scheme of clauses 60.10 to 60.14 of the contract envisages submission of a statement at completion (Cl.60.10) not later than 84 days after the issue of the Taking-over Certificate. This statement is to contain the final value of all work done upto the date stated in the Taking-over Certificate. The Engineer is thereupon expected to certify payment. The next stage is of a draft final statement to be submitted under Cl.60.11 not later than 56 days after the issue of Defects Liability Certificate. After following the procedure in Cl. 60.11, a final statement is prepared. This statement is on the basis of the agreement/disagreement between the Engineer and the Contractor after following the procedure under Cl.60.11. The final statement in the present case (termed as 'draft final statement') was submitted on 24 October, 2009. No document submitted earlier could be termed as the final statement. [It is pertinent to note that this statement is in fact considered as the draft statement within the meaning of Clause 60.11 by the Petitioner (see para 55 of the petition).] The crucial question is, whether the submission of this statement on 24 October 2009 is in order and in accordance with the contract between the parties. If this statement is in order and within time, the invocation of the arbitration agreement on 2 February, 2010 is clearly within time. It is important to remember in this behalf that the contract work was taken over by the Petitioner with effect from 30 March, 2001. (Even the extended Defects Liability Period expired with effect from 27 May, 2003

under the certificate issued on 13 June, 2003.) And yet the statement at completion referred to in clause 60.10 of the contract was not issued within 84 days of the issue of the Taking-over Certificate. So also, no final statement was issued within 56 days of issue of the Defect Liability Certificate. What was issued at that time was a running account bill, being R.A. Bill No.67. The Petitioner not only accepted this interim bill, but the same was even certified by the Engineer by way of an interim payment certificate, namely, IPC 69A and 69B. If that is so, it is clearly reasonable to hold that both parties mutually did away with the requirement of clause 60.10 and waived the same. The claimant, thereafter, submitted what it termed as draft final bill on 22 July, 2003. Even if one were to treat this as a draft final statement under clause 60.11 of the contract, what the contract contemplates is that after this submission, the Engineer and the Contractor would consult each other, during which consultation, further information or changes in the draft, as may be required by the Engineer, would be made by the Contractor, and finally, the parties would reach a stage where there is an agreement between them on the sums to be paid to the Contractor or they arrive at sums, which they agree and other sums, about which there is a dispute. If there is any dispute, the Engineer is required to submit an interim payment certificate for those parts of the draft final statement, which are not in dispute. It is only then that the disputes are required to be settled in accordance with clause 67 of the contract, that is to say, by arbitration. As noted by the arbitrators, the consultation stage itself clearly lasted till about March 2006. The stage of agreement on those parts of the draft final statement, which were not in dispute, could be said to have been arrived at when the Engineer's decision reached the contractor. Even at

that stage, however, there were outstanding issues, which prevented the stage of final statement, as noted by the arbitrators. These issues pertained to the appointment by the Petitioner of its own officer as the 'Engineer', which was contested by the Respondent and the interim bills which were in dispute before the earlier arbitral tribunal. The awards on these bills were finally delivered on 10 July, 2008 and 14 November 2008 by the arbitral tribunal. There was no case for submission of any final statement till then. The final statement submitted on 24 October, 2009 can, thus, be said to be within the terms of the contract between the parties. It was submitted by the Respondent to the Engineer, after the consultative process referred to in clause 60.11 was gone through and the issue concerning those parts of the draft final statement, which were not in dispute, was resolved through the process of arbitration concerning interim certificates. Since no final certificate was issued to the Contractor, or no payment was made in response to the final statement, the Contractor duly issued a notice of arbitration invoking the arbitration agreement.

10. As held by a Division Bench of Calcutta High Court in the case of **Mc. Nally Bharat Engineering Ltd. vs. Benoy Krishna Bose**⁴, and as noted by the arbitral tribunal, limitation is to be computed not from the date on which the bill was submitted, but from the date on which the employer refused to pay the bill. The dispute could be said to have arisen on and from the date of such refusal or non-payment. By all accounts, in the present case, a bill in the form of a final statement was submitted on 24 October, 2009. The Petitioner failed and neglected to

⁴ 2003 (1) Arb. L.R. 143

pay this bill and, as a result, the Contractor invoked the arbitration clause by nominating its arbitrator on 2 February, 2010. The Petitioner reiterated its refusal to pay by its communication dated 10 February 2010, in reply to the arbitration notice of 2 February, 2010. In the premises, the event of *terminus a quo*, which is by invocation of the arbitration agreement, was within limitation.

11. Mr. Setalvad referred to the cases of **Municipal Corporation of Greater Mumbai vs. Adarsh Builders**⁵ and **State of Maharashtra vs. Sadiq & Company**⁶ in support of his contention that the contractor's right to be paid for the work done arises upon completion of work. There is no doubt that ordinarily it is so. But when the contract itself provides for various steps to be taken by the parties before a final bill could be raised by the contractor, the contractor is clearly justified in raising the final bill after such steps and the disputes between the parties can be said to arise only thereafter if such bill is contested by the employer. In **Adarsh Builders'** case, what was in issue was an interpretation of clauses 96 and 97 of the General Conditions of Contract in that case. Whilst interpreting the clauses, the Court found that whatever steps were to be taken under clause 96 were to be taken within the period of limitation and the period taken up for taking such steps could not be excluded whilst computing the period of limitation. In **Sadiq & Co.'s** case, there was clause 8 of the tender agreement dealing with payment. It fixed the time of payment and the limitation was reckoned accordingly. There are cases and cases and they involve diverse terms of contract. The courts have to be circumspect in applying decided

⁵ Arbitration Petition No.530 of 2012 dated 27.10.2014.

⁶ 1993 Mh.L.J. 1476

cases as precedents when the terms of contract are materially different. As noted above, under the terms of the present contract, the submission of the final statement as of the date of 24 October, 2009 was in order and within time and accordingly, the period of limitation cannot be said to have commenced at any time before.

12. There is, accordingly, no merit in the petition. The arbitration petition is dismissed. No order as to costs.

(S.C. GUPTE, J.)