

Arun

REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 494 OF 2011
IN
ARBITRATION PETITION NO. 228 OF 2009**

WALTER BAU AG (IL),
Germany c/o Mr Werner Schneider,
Insolvency Administrator of Walter Bau AG
SKP, Bahnhofstrabe-39 89231, Neu-Ulm,
Germany

... APPELLANT
(ORIG. RESPONDENT)

~ VERSUS ~

**MUNICIPAL CORPORATION OF
GREATER MUMBAI,**
Constituted under the provisions of
Mumbai Corporation Act, having its office
at Municipal Head Office, Mahapalika
Marg, Fort, Mumbai 400 001.

... RESPONDENT
(ORIG. PETITIONER)

**WITH
COMMERCIAL APPEAL NO. 35 OF 2019
IN
ARBITRATION PETITION NO. 1126 OF 2010**

ARUN
RAMCHNDRA
SANKPAL

Digitally signed
by ARUN
RAMCHNDRA
SANKPAL
Date: 2022.09.05
16:53:16 +0530

WALTER BAU AG (IL),
Germany c/o Mr Werner Schneider,
Insolvency Administrator of Walter Bau AG
SKP, Bahnhofstrabe-39 89231, Neu-Ulm,
Germany

...APPELLANT
(ORIG. RESPONDENT)

~ VERSUS ~

**MUNICIPAL CORPORATION OF
GREATER MUMBAI,**
Constituted under the provisions of
Mumbai Corporation Act, having its office
at Municipal Head Office, Mahapalika
Marg, Fort, Mumbai 400 001.

...RESPONDENT
(ORIG. PETITIONER)

WITH
APPEAL NO. 34 OF 2019
IN
ARBITRATION PETITION NO. 1137 OF 2010

WALTER BAU AG (IL),
Germany c/o Mr Werner Schneider,
Insolvency Administrator of Walter Bau AG
SKP, Bahnhofstrabe-39 89231, Neu-Ulm,
Germany

...APPELLANT
(ORIG. RESPONDENT)

~ VERSUS ~

**MUNICIPAL CORPORATION OF
GREATER MUMBAI,**
Constituted under the provisions of

...RESPONDENT
(ORIG. PETITIONER)

Mumbai Corporation Act, having its office
at Municipal Head Office, Mahapalika
Marg, Fort, Mumbai 400 001.

WITH
COMMERCIAL APPEAL NO. 36 OF 2019
(Outside Maharashtra)
IN
ARBITRATION PETITION NO. 700 OF 2011

WALTER BAU AG (IL),
Germany c/o Mr Werner Schneider,
Insolvency Administrator of Walter Bau AG
SKP, Bahnhofstrabe-39 89231, Neu-Ulm,
Germany

...APPELLANT
(ORIG. RESPONDENT)

~ VERSUS ~

**MUNICIPAL CORPORATION OF
GREATER MUMBAI,**
Constituted under the provisions of
Mumbai Corporation Act, having its office
at Municipal Head Office, Mahapalika
Marg, Fort, Mumbai 400 001.

...RESPONDENT
(ORIG. PETITIONER)

WITH
APPEAL NO. 498 OF 2011
(Outside Maharashtra)
IN
ARBITRATION PETITION NO. 226 OF 2009

WALTER BAU AG (IL),
Germany c/o Mr Werner Schneider,
Insolvency Administrator of Walter Bau AG
SKP, Bahnhofstrabe-39 89231, Neu-Ulm,
Germany

...APPELLANT
(ORIG. RESPONDENT)

~ VERSUS ~

**MUNICIPAL CORPORATION OF
GREATER MUMBAI,**
Constituted under the provisions of
Mumbai Corporation Act, having its office
at Municipal Head Office, Mahapalika
Marg, Fort, Mumbai 400 001.

...RESPONDENT
(ORIG. PETITIONER)

WITH
APPEAL NO. 501 OF 2011
(Outside Maharashtra)
IN
ARBITRATION PETITION NO. 227 OF 2009

WALTER BAU AG (IL),
Germany c/o Mr Werner Schneider,
Insolvency Administrator of Walter Bau AG
SKP, Bahnhofstrabe-39 89231, Neu-Ulm,
Germany

...APPELLANT
(ORIG. RESPONDENT)

~ VERSUS ~

**MUNICIPAL CORPORATION OF
GREATER MUMBAI,**

...RESPONDENT
(ORIG. PETITIONER)

Constituted under the provisions of
Mumbai Corporation Act, having its office
at Municipal Head Office, Mahapalika
Marg, Fort, Mumbai 400 001.

WITH
APPEAL NO. 495 OF 2011
(Outside Maharashtra)
IN
ARBITRATION PETITION NO. 591 OF 2008

WALTER BAU AG (IL),
Germany c/o Mr Werner Schneider,
Insolvency Administrator of Walter Bau AG
SKP, Bahnhofstrabe-39 89231, Neu-Ulm,
Germany

... APPELLANT
(ORIG. RESPONDENT)

~ VERSUS ~

**MUNICIPAL CORPORATION OF
GREATER MUMBAI,**
Constituted under the provisions of
Mumbai Corporation Act, having its office
at Municipal Head Office, Mahapalika
Marg, Fort, Mumbai 400 001.

... RESPONDENT
(ORIG. PETITIONER)

WITH
APPEAL NO. 496 OF 2011
(Outside Maharashtra)
IN

ARBITRATION PETITION NO. 592 OF 2008

WALTER BAU AG (IL),
Germany c/o Mr Werner Schneider,
Insolvency Administrator of Walter Bau AG
SKP, Bahnhofstrabe-39 89231, Neu-Ulm,
Germany

...APPELLANT
(ORIG. RESPONDENT)

~ VERSUS ~

**MUNICIPAL CORPORATION OF
GREATER MUMBAI,**
Constituted under the provisions of
Mumbai Corporation Act, having its office
at Municipal Head Office, Mahapalika
Marg, Fort, Mumbai 400 001.

...RESPONDENT
(ORIG. PETITIONER)

WITH

APPEAL NO. 497 OF 2011

(Outside Maharashtra)

IN

ARBITRATION PETITION NO. 593 OF 2008

WALTER BAU AG (IL),
Germany c/o Mr Werner Schneider,
Insolvency Administrator of Walter Bau AG
SKP, Bahnhofstrabe-39 89231, Neu-Ulm,
Germany

...APPELLANT
(ORIG. RESPONDENT)

~ VERSUS ~

**MUNICIPAL CORPORATION OF
GREATER MUMBAI,**
Constituted under the provisions of
Mumbai Corporation Act, having its office
at Municipal Head Office, Mahapalika
Marg, Fort, Mumbai 400 001.

...RESPONDENT
(ORIG. PETITIONER)

APPEARANCES

FOR THE APPELLANT

**Mr Zal Andhyarujina, Senior
Advocate, with Javed Gaya,
Hursh Meghani, Vidya
Chaudhari & Mona Malvade, i/
b Chambers of Javed Gaya.**

**FOR RESPONDENT
MCGM**

**Mr RS Apte, Senior Advocate, with
Vaishali Chaudhary, Pooja
Yadav & Yamuna Parekh, i/b
Sunil Sonawane.**

**CORAM : G.S.Patel &
Gauri Godse, JJ**

DATED : 26th August 2022

ORAL JUDGMENT (Per GS Patel J):-

1. This common order and judgment will dispose of this group of Appeals filed against two orders of 24th March 2011 by a learned Single Judge of this Court setting aside a set of arbitral awards. Appeal No. 495 of 2011 is against the order in Arbitration Petition No. 591 of 2008. This is the principal appeal because all the other

appeals received an order of the same date (in arbitration petitions Nos. 592 of 2008, 593 of 2008, 226 of 2009, 227 of 2009 and 228 of 2009) on the basis of the order impugned in Appeal No.495 of 2011.

2. We have heard Mr Andhyarujina, learned Senior Advocate for the Appellants and Mr Apte, learned Senior Advocate for the Respondents, the Municipal Corporation of Greater Mumbai (“MCGM”).

3. A brief chronology will provide the necessary context. The project in question related to municipal sewerage works, and, specifically, marine outfalls at Worli and Bandra. The contracts were funded by the World Bank. The original contractor successfully obtained the bid was one Dyckerhoff & Widmann AG, a German company (“D&W”). The contract was awarded to D&W on 21st August 1995. On 15th October 1996, D&W gave a power of attorney to one Dimitrius D’Mello to represent it in connection with the Bandra sewerage project–Bandra and Worli outfalls, Contract 2FF–3FF.

4. The contract proceeded. A few years later, on 6th November 1999, D&W formed a 100% subsidiary called Dywidag International GmbH, another German company (“DI”). On 22nd March 2000, D&W and DI executed what is called a Contribution Agreement along with a declaration of acceptance. This did not affect D&W’s contractual obligations under the sewerage project(s).

5. Between 17th May 2001 and 29th June 2001 there was a Merger Agreement between D&W and the present Appellant, Walter Bau AG (“**Walter Bau**”). It is at this stage we that must refer to certain provisions of the contract in question. As is or was usual with such MCGM contracts, disputes between the MCGM as the owner on the one hand and its contractor on the other were required to refer to what is called a Disputes Review Board (“**DRB**”). This is provided in clause 67 of the contract which is extracted at pages 493 and 494. The arbitration clause 67.3 is at page 495. Broadly stated, these contracts require that disputes be first referred to the DRB, which makes its recommendations. If these are not accepted, then there follows a reference to arbitration. The relevant clauses, both sides accept, were substituted for the originals, as follows:

“Sub-Clause 67.1 is substituted by the following:

Sub-Clause 67.1 Disputes Review Board

If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after the repudiation or other termination of the Contract, including any disagreement by either party with any action, inaction, opinion, instructor, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place be referred to the Disputes Review Board (“the Board”).

The Board shall be established by the signing of a Board Member’s Declaration of Acceptance (as required by paragraph 12 of Annex A to these Conditions of Particular Application) by all three Board Members.

The Board shall comprise three Members experienced with the type of construction involved in the Works and with the interpretation of contractual documents. One Member shall be selected by each of the Employer and the Contractor and approved by the other. If either of these Members is not so selected and approved within 84 days of the date of the Letter of Acceptance, then upon the request of either or both parties such Member shall be selected as soon as practicable by the Appointing Authority specified in the Appendix to Tender. The third Member shall be selected by the other two and approved by the parties. If the two Members selected by or on behalf of the parties fail to select the third Member within 14 days after the later of their selections, or if within 14 days after the selection of the third Member, the parties fail to approve that Member, then upon the request of either or both parties such third Member shall be selected promptly by the President of the Institution of Civil Engineers, United Kingdom, who shall seek the approval of the proposed third Member by the Parties before selection but, failing such approval nevertheless shall select the third Member. The third member shall serve as Chairman of the Board.

In the event of death, disability, or resignation of any Member, such Member shall be replaced in the same manner as the Member being replaced was selected. If for whatever other reason a Member shall fail or be unable to serve, the Chairman (or failing the action of the Chairman then either of the other Members) shall inform the parties and such non-serving Member shall be replaced in the same manner as the Member being replaced was selected. Any replacement made by the parties shall be completed within 28 days after the event giving rise to the vacancy on the Board, failing which the replacement shall be made by the appointing Authority in the same manner as described above. Replacement shall be considered complete when the

new Member signs the Board Member's Declaration of Acceptance. Throughout any replacement process the Members not being replaced shall continue to serve and the Board shall continue to function and its activities shall have the same force and effect as if the vacancy had not occurred, provided, however, that the Board shall not conduct a hearing nor issue a Recommendation until the replacement is completed.

Either the Employer or the Contractor may refer a dispute to the Board in accordance with the provisions of Annex A to these Conditions of Particular Application.

If either the Employer or the Contractor is dissatisfied with any Recommendation of the Board, or if the Board fails to issue its Recommendation within 56 days after receipt by the Chairman of the Board of the written Request for Recommendation, or such extended period agreed as hereinafter provided, then either the Employer or the Contractor may, within 14 days after his receipt of the Recommendation, or within 14 days after the expiry of the said 56-day period or extended period, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. However the 56 day period for the Board to consider a dispute may be extended at the request of the Board by mutual agreement between the Employer and the Contractor. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 57.4 no arbitration in respect thereof may be commenced unless such notice is given.

If the Board has issued a Recommendation to the Employer and the Contractor within the said 56 days and no notice of

intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor within 14 days after the parties received such Recommendations from the Board, the Recommendation shall become final and binding upon the Employer and the Contractor.

Whether or not it has become final and binding upon the Employer and the Contractor, a Recommendation shall be admissible as evidence in any subsequent dispute resolution procedure, including any arbitration or litigation having any relation to the dispute to which the Recommendation relates.

All Recommendations which have become final and binding shall be implemented by the parties forthwith, such implementation to include any relevant action of the Engineer.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every decision of the Engineer unless and until the same shall be revised as a result of the operation of this Sub-Clause 67.1 or as hereinafter provided, in an arbitral award.

Sub-Clause 67.3 is modified to read as follows:

Sub-Clause 67.3 Arbitration

Any dispute in respect of which the Recommendation, if any, of the Board has not become final and binding shall be finally settled by arbitration under the UNCITRAL Arbitration Rules. The arbitral tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate, or valuation of the Engineer and any Recommendation(s) of the Board related to the dispute.

Neither party shall be limited in the proceedings before

such tribunal to the evidence or arguments put before the Board for the purpose of obtaining its Recommendation(s) pursuant to Sub-Clause 67.1. No Recommendation shall disqualify any Board Member from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Arbitration may be commenced prior to or after completion of the Works, provided that the obligation of the Employer, the Engineer, the Contractor and the Board shall not be altered by reason of the arbitration being conducted during the progress of the Works.

The appointing authority shall be the Secretary General of the Permanent Court of Arbitration, The Hague. The place of arbitration shall be Bombay and the language of arbitration shall be English.”

(Emphasis added)

6. On 7th October 2003, a letter on D&W letterhead was presented to the DRB ostensibly in compliance with the contractual provisions referring disputes to the DRB for its recommendations. This is the centre of the disputes, as we shall presently see.

7. On 25th February 2004, the DRB made its recommendations based on the reference made to it on 7th October 2003. For reasons that shortly become apparent, we are not in this Appeal concerned with those recommendations or indeed with the merits of the arbitration tribunal’s final decision, that is to say the actual award that came to be made. On 15th February 2005, D&W hived off DI to an Austrian company. It is to be remembered that D&W was by now merged with Walter Bau, and about this too there is no dispute.

8. On 1st April 2005, Walter Bau was taken into insolvency proceedings by a foreign Court in Germany.

9. In the meantime, arbitration commenced under the contract since the MCGM did not accept the DRB's recommendations. The MCGM filed its statement of claim on 8th March 2006 and on 9th May 2006 D&W entered a statement of defence. MCGM replied to that statement of defence.

10. On 12th July 2006, there came to be made an application before the arbitral tribunal and it is this application that was to be the source of much ensuing confusion and misunderstanding. This application was made, oddly enough, by DI (by then sold off to an Austrian company). DI sought that it be made a party respondent to the arbitration claiming that it was an assignee of the sewerage contract in question from D&W (now entirely merged with and held by Walter Bau, itself in liquidation). DI also sought that its name should be substituted for that of D&W, or, in other words, that DI should be allowed to continue in arbitration on the basis that DI was now an approved successor-in-title to D&W for the purposes of the sewerage project. On 7th March 2007, the MCGM applied to the arbitral tribunal to terminate the arbitral proceedings. Mr Apte is at some pains to point out that at no point had the MCGM approved of an assignment or a transfer of the contract from D&W to DI. The MCGM also did not accept that DI had been hived off by D&W.

11. On 31st August 2007, the three-member arbitral tribunal passed what is commonly called in these proceeding as its "identity

order”. This related to the so-called “identity” of the respondents in arbitration, i.e., D&W/DI. The question before the arbitral tribunal was, given this background, whether DI was the successor-in-title of D&W for the purpose of the sewerage contract and whether DI’s application of 12th July 2006 should be allowed. There was also a question of the Contribution Agreement of 22nd March 2000 between D&W and DI. The arbitral tribunal concluded that DI was not, at least for the purposes of the contract in question, the successor-in-title of D&W. We are not concerned with the finding regarding the Contribution Agreement. A specific finding was returned that this particular contract had never been validly moved, transferred or assigned from D&W to DI.

12. About a year later, on 10th July 2008, the arbitral tribunal passed an award directing the MCGM to pay Walter Bau/D&W (because D&W was now merged with the Walter Bau) an amount of roughly Rs. 59 crores and interest at 12% per annum (the award says 12% per month, possibly a typographical error) from 8th April 2004.

13. The MCGM challenged this award before the learned Single Judge and it is this order of 24th March 2011 by the learned Single Judge that is called into question in the present Appeal. Very shortly stated, the arbitral tribunal had upheld the recommendations of the DRB and this is what aggrieved the MCGM.

14. At this stage we proceed to juxtapose the two arbitral orders. The identity order clearly holds that DI had not established that it was the legal successor to D&W nor that it was the lawful assignee

of the D&W sewerage contract. It also holds that DI was, consequently, not ‘the contractor’ under the sewerage contract. Consequently in the identity order, the arbitral tribunal rejected DI’s application to be considered as the proper respondent. Now the final rupee award of the arbitral tribunal is not of immediate concern to us today because of the view the learned Single Judge took in the impugned order. In essence, the learned Single Judge held that the initial reference, though on the D&W’s letterhead, by a person who was an employee of D&W was “unauthorised”. Therefore, in the view of the learned single Judge, there was no valid reference to the DRB. Consequently the entire arbitral award was vulnerable and liable to be set aside on that ground alone. Nowhere in the impugned order do we find a discussion on the merits of the challenge by the MCGM to the arbitral tribunal’s final rupee award.

15. The identity order of 31st August 2007 — particularly paragraph 36 — notes that DI had conceded that one of its employees “made use of the letterhead” of D&W, but that after this DI had “ceased to exist”. The learned Single Judge said that therefore, the original reference to the DRB “was not filed by the original contractor”, i.e., D&W but by an employee of its erstwhile subsidiary. At that time, D&W had already merged with Walter Bau. Proceeding on the basis of the arbitral tribunal’s findings and conclusions on DI’s application, the learned Single Judge held that the “subsidiary company”, i.e., DI, had “no authority” to make an application referring the dispute to the DRB on behalf of original contractor.

16. Then the learned Single Judge turned to paragraphs 70 and 71 of the final award that was challenged before him. Here the arbitral tribunal had said:

“70. In light of these terms of the Contribution Agreement, the **Tribunal is satisfied that Dywidag was authorised to act on behalf of Dyckerhoff with respect to Dyckerhoff’s rights and obligations under the Contract, including the dispute settlement provisions contained therein.**

71. However, even if we assume that the Contribution Agreement did not bestow authority on Dywidag to act on behalf of Dyckerhoff with respect to the Contract in these proceedings, **the Tribunal is satisfied that Walter Bau-A.G. [il], as legal successor to Dyckerhoff, has now ratified the acts of Dywidag.**”

(Emphasis added)

17. The learned Single Judge came to the conclusion that this finding was contrary to the finding of the arbitral tribunal itself in the identity order. He therefore held that the finding in the final arbitral award was liable to be set aside inter alia because the identity order had never been challenged. In the impugned order, and again this is not seriously disputed, Walter Bau’s insolvency administrator had specifically ratified the act of reference to the DRB. The learned Single Judge held that this was useless because the insolvency administrator came on the scene only on 1st April 2005, whereas DI’s application to the DRB was 7th October 2003. The learned Single Judge therefore concluded that the insolvency administrator could not ratify the action taken on behalf of D&W or Walter Bau “before the insolvency administrator was appointed”.

18. We believe the learned Single Judge materially misdirected himself on all counts. Obviously, a ratification can only happen after the event. If the action is to be approved contemporaneously or in advance, there is no question of “ratification”; it is simply prior approval. The second major aspect is that the learned Single Judge seems to have completely failed to appreciate the two distinct aspects that were at play at here. One question was whether DI was in law the successor-in-title to D&W and whether the subject contracts stood assigned or otherwise transferred to it. The second question, quite distinct from the first, was whether an employee of DI could have been authorised by D&W to make an application on D&W letterhead to the DRB in accordance with clause 67. The two issues are distinct. The question of succession, even if answered against DI, would not necessarily negate the question of authorisation. That is the short point involved in these Appeals.

19. *First*, a company may authorise anyone and there is no law that requires the authorisation to be given only to an employee. *Second*, it is nobody’s case that the use of D&W letterhead was an act of mischief, illegality or fraud. Nobody has argued this and it forms no part of either of these awards. What the arbitral tribunal had before it at the time of identity order was a technical legal question occasioned by DI’s application for substitution and impleadment. This had nothing at all to do with *authorisation*. Let us consider this from a different perspective. Had DI not filed that application, no question would have then arisen of assessing the authorisation of the person who made the reference to the DRB on D&W’s letterhead. The entire question of succession was

literally a sideshow and ought not to have entered into the calculus at all.

20. This is the more so when one considers that today Walter Bau, whether through its insolvency administrator or otherwise, has specifically ratified that authorisation and that reference to the DRB. The MCGM has no locus to challenge that authorisation. It is D&W letterhead that was used and it was used by an identified person known to D&W and now known to Walter Bau. Whether that person was employed by DI, D&W or was, to put it differently, the man on the Clapham omnibus, makes not a whit of difference.

21. That there was authorisation cannot be seriously disputed because Exhibit “A” to the Appeal shows us a power of attorney given to D’Mello to represent D&W in connection with the project. The only question the learned Single Judge really had to ask was whether the signatory to the letter of 7th October 2003 did or did not hold authority from D&W. It was entirely irrelevant to the question of authorisation whether the employee who signed the letter was employed by D&W, DI or some other entity altogether. The only question was of authorisation and the question of legal succession did not in any way even slightly affect the reference to the DRB.

22. The findings of the arbitral tribunal in its identity order regarding legal succession and the Contribution Agreement ought to have been seen as clearly irrelevant and immaterial to the question of authorisation of the person making the reference to the DRB.

23. We find that it is on this limited ground that the learned Single Judge allowed the petition entirely. In essence, the learned Single Judge concluded that the entire arbitral proceeding was effectively a nullity because the initial reference to the DRB was not “authorised”. This finding is incorrect. The reference to the DRB was indeed authorised irrespective of whether or not DI was a successor-in-title to D&W. That authorisation has since been ratified. This is therefore no ground whatsoever to set aside the final arbitral award or awards that came to be passed.

24. We make it clear that we have not assessed the merits of the MCGM’s challenge and all contentions in that regard are being kept open while we set aside the impugned orders, restore the arbitration petitions to file and remand them to the learned Single Judge for final disposal on merits. The learned single Judge is to do so without considering this question of authorisation. Mindful as we are of the pressures on the Single Judge, we do not fix a time limit for final disposal but only request the learned Single Judge to accord these final hearings the maximum possible priority given other exigencies.

25. Following this set of orders in the arbitration petitions, on 24th January 2013, another learned Single Judge of this Court disposed of connected Arbitration Petitions adopting the reasoning of the learned Single Judge impugned in the present Appeals.

26. Consequently, the orders of 24th January 2013 which are the subject matters of Appeals Nos. 34 of 2019, 35 of 2019 and 36 of 2019 are also quashed and set aside. Those arbitration petitions are

also restored to file and remanded for final disposal at the earliest convenience of the learned single Judge.

27. In the facts and circumstances of the case, we award no costs in these appeals but leave it to the parties to press for costs at the time of the final disposal of the arbitration petitions.

(Gauri Godse, J)

(G. S. Patel, J)