

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 22nd January, 2018

Date of decision : 22nd March, 2018

+ **RFA 571/2017 & CM APPL. 21357/2017 (Stay)**

**NORTH DELHI MUNICIPAL CORPORATION
& ANR.**

..... Appellants

Through: Mr. Sunil Goel, Standing Counsel for
Nr.DMC with Ms. Supreet Bimbora,
Mr. Mayank Goel, Advocates
Mr. S.C. Meena, EE (Project Narela)

versus

SHIV SHANKAR GUPTA

..... Respondent

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. These are a batch of appeals which have arisen out of disputes between Contractors/Plaintiffs (*hereinafter*, 'Contractors') on the one hand and the North Delhi Municipal Corporation (*hereinafter*, 'NrDMC') and East Delhi Municipal Corporation (*hereinafter*, 'EDMC'), on the other. NrDMC and EDMC are collectively referred to as 'Corporations'. The facts in each appeal are different and hence separate judgements are being passed in each of the appeals.

2. Briefly, these are cases where various work orders were placed on Contractors by both the Corporations. The works were executed by the Contractors and thereafter, the Engineer-in-Charge has passed the final bills. Payments in respect thereof were not made. Suits for recovery were filed by the Contractors. The Trial Court decreed the suits in favour of the

Contractors.

3. In the work orders, the Contractors seek either/all of the following payments:

- a. Payment of the principal amount as passed in the final bill;
- b. Refund of security deposit;
- c. Interest on account of late payment of the principal amount, as also due to delay in refund of security deposit.

4. The Corporations rely on Clauses 7 and 9 of the General Conditions of Contract in respect of payment of principal amount and interest, read with the amendment of 19th May, 2006. In respect of the security deposit, the Corporations rely on Clauses 17 and 45 of the General Conditions of Contract for Municipal Corporation of Delhi Works (*hereinafter, 'General Conditions of Contract'*). In addition, the Corporations also rely upon Circular dated 10th June 2014 signed by the Chief Engineer, MCD which was issued in the nature of a clarification.

5. In the present case, the following work orders were placed on the Contractor by the Corporation:

S No.	Work Order No.	Contractual Amount	Dated
1.	EE(CLZ–M-IV)/SYS/2012-2013/233	Rs. 4,12,574/-	27.12.2012
2.	EE(CLZ–M-IV)/SYS/2012-2013/234	Rs. 4,12,574/-	27.12.2012
3.	EE(CLZ–M-IV)/SYS/2012-2013/408	Rs. 15,83,372/-	16.03.2013
4.	EE(M-IV)/SYS/2013-2014/241	Rs. 3,61,277/-	03.10.2013
5.	EE(CLZ–M-IV)/SYS/2014-2015/86	Rs. 4,68,257/-	24.11.2014

6.	EE(CLZ–M-IV)/SYS/2014-2015/87	Rs. 2,52,734/-	24.11.2014
7.	EE(CLZ–M-IV)/SYS/2014-2015/88	Rs. 2,60,617/-	25.11.2014
8.	EE(CLZ–M-IV)/SYS/2014-2015/232	Rs. 3,62,232/-	26.12.2014

6. Security to the tune of Rs.3,82,163/- had been deposited in respect of all the above work orders. The measurements were framed and after verification of the same, the Contractor submitted the final bills. It was the Contractor's submission that as per the final bills, the following amounts were due:

- (a) Principal amount of Rs.35,00,227/-
- (b) Security deposit/Earnest money amount to of Rs.3,82,163/-.
- (c) Interest @ 18% p.a. calculated from the date when each of the amount had become due and payable by the Corporation to the Contractor.

7. The Contractor issued a notice to the Corporation on 23rd November, 2015 calling upon the Corporation to make payments. Since no payment was received, a suit under Order XXXVII of the CPC came to be filed. In the suit, the Contractor computed interest at 18% and sought a decree for a sum of Rs.51,88,717/- alongwith *pendente lite* and future interest. The suit was however registered as an ordinary suit.

8. In its written statement, the corporation contended as under:

“There is a specific condition in the agreement entered into between the parties that the payment of bills will depend on availability of funds in particular head of account from time to time in North DMC. The payment of bills shall be made strictly on queue basis i.e. first

the past, liabilities will be cleared and after that the release of payment for passed bills will be in order of the demand received at Head Quarter under particular head of account. Thus, it is submitted that the delay in making the payment do not attract any liability and the plaintiff is not entitled to any interest on account of delay in payment as per the amended rules incorporated by circular dated 19.5.2006 in N.I.T. Tender conditions. The plaintiff, after going through & understanding the terms and conditions of NIT as well as tender documents, had participated in the Tender and executed the work.”

9. The Corporation contended that the bills were not submitted by the Contractor and the amounts for which the bills were actually passed were as under. Paragraph 6 of the Written Statement is quoted below:

“It is submitted that bills were not submitted by the plaintiff and the details of bills for the following work orders are as under:-

<i>Work Order No.</i>	<i>Date of work order</i>	<i>Date of passing of bills</i>	<i>Gross amt. of passed bill</i>	<i>Net amt. of passed bills</i>	<i>Demand no./date for the bill passed</i>
234	27.12.12	29.4.13	411675/-	355805/-	25/ 17.6.14
233	27.12.12	29.4.13	411863/-	322979/-	26/ 17.6.14
408	16.3.13	23.12.13	1583336/-	1357210/-	348/ 4.3.14
241	3.10.13	13.2.14	361175/-	308329/-	336/ 27.2.14
87	24.11.14	20.3.15	252516/-	211422/-	152/ 30.3.16
88	24.11.14	20.3.15	260478/-	217455/-	61/ 15.9.15

86	24.11.14	20.3.15	467622/-	387447/-	152/ 30.3.16
232	26.12.14	13.3.15	362168/-	306080/-	308/ 23.3.15

It is submitted that the said bills for the said amount as stated above were sent to the Head quarter on the availability of funds for the payment on queue basis....”

10. In view of the categorical admission by the Corporation, an application dated 6th September, 2016 under Order XII Rule 6 of the CPC came to be filed. The Trial Court decreed the suit, on this application as under:

“13. Elicited facts of the matter in hand are clear pointers of passing of reasonable time after completion of the work in question by plaintiff, preparation of the bills in question by defendant Corporation and consequential non-payment till date by defendant Corporation to clear outstanding liability payable to plaintiff with respect to the first and final bills totalling Rs.34,99,727/-. Under the garb of covenant in Clause 9 of amended General Terms & Conditions with regards to payment of bills on queue basis as per ‘FIFO’, the defendants cannot be permitted to evade the admitted liability by either delaying it beyond reasonable time or making it barred by limitation. Even otherwise, bald assertion of existence of queue of bills for works is not supported by any documentary evidence since no list of pending bills has been filed by defendant depicting the position therein of the bills of plaintiff in question for the work(s) done. Accordingly, such bald assertion of defendants per se is to postpone liability of admitted debt of defendants payable to plaintiff.

14. Since the outstanding payment of amount of first

and final bills totalling Rs.34,66,727/- stands admitted in unequivocal, unambiguous, unqualified terms by defendants in favour of plaintiff, so for that is concerned, the plaintiff is entitled for judgment on admissions. Plaintiff is held entitled for recovery of sum of Rs.34,66,727/- in his favour and against the defendants under Order XII Rule 6 of CPC. Decree sheet be prepared accordingly.

15. So far as the facets of security amount and component of interest, its period, rate or whether it is payable by defendants to plaintiff are concerned, they are the mixed questions of fact and law, requiring leading of evidence by the parties at the opportune time and shall be adjudicated after adducing of evidence by the parties.”

11. Thus, the Trial Court granted a decree for the admitted Principal amount and left the remaining issues for adjudication after trial. Two issues arise in this case:

- (i) Whether payment of the principal amount can be delayed in view of Clause 7 and Clause 9 of the General Conditions of Contract read with the amendments?
- (ii) Whether the suit was liable to be decreed under Order XII Rule 6 CPC?

12. ***History of litigations between contractors and Corporations - EDMC/ Nr.DMC in the Delhi High Court.***

(i) **Order No.1** - Order dated 1st December, 2016 passed in lead matter RFA 786/2016 and 192/2016 - These orders were passed in appeals preferred by the Nr.DMC and EDMC, respectively - In this order, a Learned Single Judge of this Court records that a consensus has been arrived between the Corporations and Contractors in the following terms:

“2. On 17.11.2016, with the consent of the parties, the following order was passed :

“6. After interacting with the counsels for the parties, a consensus has been arrived at and the following consent order is passed:-

- (i) The appellants shall file fresh compilations, complete in all respects in respect of the respondents and the other contractors, irrespective of whether they have filed any appeals/suits of recovery or not, so that there is a clarity about their priority in the wait list.*
- (ii) The appellants undertake to strictly adhere to the timeline mentioned in the compilation, for releasing payments to the respondents.*
- (iii) No payment shall be released out of turn by the appellants.*
- (iv) The appellants shall ensure that the budget for release of amounts under the head of Non-Plan Expenditure is increased on a regular basis so that the release of payments can be expedited to the respondents and other contractors in the wait list, even prior to the dates of priority mentioned against their names.*
- (v) The appellants shall upload the compilation on their websites for ease of access and update it regularly at the end of each month for the respondents and others to know what their status is in the wait list.*
- (vi) Having regard to the fact that the appellants expect the respondents to stay their hands and not pursue their legal remedies for execution of the impugned judgments and decrees for a period*

mentioned hereinafter, it is agreed that interest shall be payable to the respondents on the principal amount after the expiry of three years and ninety days reckoned from the date the concerned Division had passed the bills of the respondents for payment. In other words, a cushion of 90 days is being provided to the Head Quarters of both the appellants for completing the administrative work of receiving and diarising the bills received from different Divisions and preparing a combined list for payment and it is agreed that for the said period, no interest shall be payable to the respondents.

(vii) It is further agreed that the appellants will not be liable to pay interest on the principal amounts payable to the respondents under the impugned judgments and decrees, for a period of three years reckoned from the date of expiry of 90 days mentioned above.

(viii) However, immediately on expiry of three years as noted above, if the amounts remain outstanding for any reason whatsoever, the appellants shall pay interest @ 9% per annum on the principal amount to the respondents, for the remaining period, till realization.

(ix) It is further agreed that the aforesaid arrangement of payment of interest by the appellants @ 9% per annum on the outstanding principal amount to the respondents shall continue only for a period of two years, reckoned from the end of the third year as mentioned in clause (vii) hereinabove.

(x) If the amounts remain payable by the

appellants even thereafter, the respondents shall be entitled to seek legal recourse for execution of the impugned judgments and decrees and claim interest on the decretal amount from day one.

(xi) The respondents undertake that in view of the settlement arrived at with the appellants, as recorded above, they shall not take any steps to file execution petitions in respect of the impugned judgments and decrees, subject matter of the present appeals, for the period mentioned hereinabove.

(xii) As for the already pending execution petitions, orders passed in these proceedings shall be placed on record so that they can be disposed of by the concerned courts on the basis of the consent order, with liberty granted to the respondents to file fresh execution petitions in case of default on the part of the appellants, as has been detailed above.”

13. The said order further records in paragraph Nos.14 to 17 as under:

“14. The said offer is however unacceptable to the counsels for the respondents who submit that they would rather pursue the pending suits for payments of the security amount with interest etc. as the time line mentioned by the appellants for release of the payments is too long.

15. It is therefore clarified that the consent orders passed in these appeals shall only govern the payments that are the subject matter of the impugned judgments and decrees and the suits that have been instituted by the respondents against the appellants for recovery of the security amount with interest, etc., and are pending adjudication in the trial court, shall continue.

16. At this stage, Mr. Sudhir Gupta, learned counsel appearing for the respondents in RFA 701/2016, RFA No.707/2016, RFA 788/2016, RFA 789/2016, RFA 791/2016 submits, on instructions from his clients, that they are ready and willing to settle the entire dispute with the appellant/NrDMC by accepting the timeline for release of payments, including the amount due towards security deposit, as mentioned in Annexure-A. The other side is in any case agreeable to the said suggestion.

17. Accordingly, the entire dispute, subject matter of the captioned appeals including the claim of refund of security deposit with interest etc. raised in the suits instituted by the said respondents out of which the appeals have arisen, stand full and finally settled in terms of the consent order passed on 17.11.2016. It is clarified that the appellant/NrDMC shall refund the security amounts to the said respondents, subject matter of the pending suits, contemporaneous to the release of the decretal amounts, as per the seniority assigned to them in the wait list on the same terms and conditions as recorded on 17.11.2016. In view of a comprehensive settlement having been arrived at between the appellant/NrDMC and the respondents in the appeals mentioned in para 16 above, the respondents in the said cases shall file copies of the orders passed in these proceedings in their respective suits and be at liberty to approach the trial court for seeking refund of the court fees under Section 16 of the Court Fees Act.”

14. Order No.1 dated 1st December, 2016 was passed in lead matter RFA 786/2106 and RFA 192/2016 involving NrDMC and EDMC. By this order, the Learned Single Judge of this Court disposed of a bunch of NrDMC and EDMC matters based on a consensus arrived at between the parties. The

Court refers to an earlier order dated 17th November, 2016 and disposes of all the appeals in the following terms -

- i) That the Corporation would prepare a complete list of contractors whose payments are due;
- ii) As and when funds become available, payments would be released to the Contractors on the basis of the priority in the waiting list. No out of turn payments would be released. The list of the Contractors would be uploaded on the website;
- iii) Interest would be payable after a period of three years and 90 days from the date when the bill is passed by the concerned division;
- iv) Interest would not run for a period of three years and 90 days as mentioned above;
- v) Upon the expiry of the said period, if amounts remain outstanding, the said interest @ 9 % p.a. on the principal amount for the remaining period shall be paid;
- vi) The said interest @ 9% p.a. shall be liable to be paid for a period of two years;
- vii) If after the period of two years, amounts remain outstanding, the Contractor shall be free to pursue their legal remedies and seek execution of the judgments and decrees passed in their favour and also claim interest on the decretal amount as per their respective entitlement from day one;
- viii) No execution shall be filed for the period agreed. In so far as security amount and interest is concerned, as per paragraph 15, the Contractors were at liberty to pursue their remedies, since suits for recovery were already pending;

ix) In few of the appeals mentioned in paragraph 16 executed herein above, settlements was arrived at even qua refund of security deposit and interest.

For the sake of convenience, the above mentioned order dated 1st December, 2016 is referred to as '**Order No.1**'. On the basis of this order, several appeals of the Corporation were disposed of.

15. In so far as security amount and interest is concerned, the suits that are pending adjudication in the Trial Court would continue. Only some Appellants, therein, agreed for a simple refund of security deposit without interest and the matter was closed qua the said Contractors. NrDMC and EDMC had attached Annexure-A along with the said order along with the details of the names of the Contractors, work orders, proper wait list of the Contractors with the expected month/year for payments.

(ii) **Order No.2-** Order dated 23rd January, 2017 passed in writ petitions with the lead matter W.P. (C) 10055/2015 - Several writ petitions were filed before the Delhi High Court by Contractors seeking their dues from the Corporation. The Corporation relied upon Clause 7 of the General Conditions of Contract. A Learned Single Judge of this Court held that the said writ petitions could be disposed of on the same terms and conditions as Order No.1, as there is no dispute to the fact that the cases of the writ petitioners were similar to the parties in the Order No.1. The Court directed that the Corporation would abide by the timeline. Thus, Order No.1 came to be followed and the writs came to be disposed of in terms thereof. For the sake of convenience, the order dated 23rd January 2017 is referred to as '**Order No. 2**'.

(iii) **Order No.3** - Orders passed in RFA Nos. 835/2017, 836/2017,

837/2017, 838/2017, 839/2017, 840/2017, and 841/2017 dated 27th September, 2017 which relied on an order of this Court dated 25th September, 2017 passed in RFA 818/2017, 820/2017 and 821/2107. The Learned Single Judge of this Court, in Order No.3 followed Order no.2 and directed as under:

“3. I do not find any inconsistency or conflict in the order passed by this Court on 25.09.2017 with the judgment passed by a learned Single Judge of this Court on 01.12.2016 in RFAs 192/2016 and 786/2016. The sum and substance continues to remain is that payment will be made in queue in terms of Clause 9 of the Contract with the earlier final bills prepared being paid earlier to the final bills which are prepared later.”

(iv) **Order No.4** - Order dated 9th October, 2017 in RFA 847/2017 and RFA 849/2017 - In these matters also the appeals were disposed of in terms of Order No.1. The relevant portion of the order reads as under:

*“....“3. I do not find any inconsistency or conflict in the order passed by this Court on 25.09.2017 with the judgment passed by a learned Single Judge of this Court on 01.12.2016 in RFAs 192/2016 and 786/2016. The sum and substance continues to remain is that payment will be made in queue in terms of Clause 9 of the Contract with the earlier final bills prepared being paid earlier to the final bills which are prepared later.
4. Appeals are accordingly disposed of.”*

3. These appeals are therefore also disposed of in terms of the order dated 27.9.2017 passed in RFA Nos. 835/2017, 836/2017 and 837/2017 decided on 27.9.2017.

4. RFAs stand disposed of accordingly.”

For the sake of convenience, this order would be referred as ‘**Order No.4**’.

16. A summary of all the above mentioned 4 orders shows that each of the orders is based on Order No.1 of 1st December, 2016. The said order i.e. Order No.1 has the following unique features:

- a) It was an order passed in appeals by consent of parties;
- b) The order dealt with payments qua the bills that were already passed and consent terms were recorded in respect thereof.
- c) The order also deals with security deposit and refunds thereof. On this aspect, some parties accepted the refunds as submitted by the Corporation but some parties agreed to continue to pursue their respective suits.
- d) In so far as interest on the payment of the bills were concerned, the parties therein consented that interest would be paid only if the amounts remained outstanding after a period of three years.
- e) None of the four orders above adjudicated the legal issues on merits. The orders did not go into the validity of Clauses 7 and 9 of the General Conditions of Contract.

17. Orders 1 - 4 would have been binding on this Court except for the fact that Order No.1 dated 1st December, 2016, thereafter, became subject matter of Special Leave Petitions, filed by various contractors, in the Supreme Court.

Proceedings before the Supreme Court.

18. Order No.1 came to be assailed before the Supreme Court in *Special Leave to Appeal (C) No. 9623/2017 Yashpal Gulati v. EDMC*. The Supreme Court recorded on 15th September, 2017 as under:

“It is stated by the learned counsel for the East Delhi Municipal Corporation that two bills have already been paid to the petitioner and the third bill in respect of which payment is due will be cleared in the month of November, 2017.

The respondent- Corporation is directed to act accordingly.

List the matter in the first week of December, 2017.”

19. In many connected Special Leave Petitions (*hereinafter*, ‘SLPs’), the Supreme Court vide order dated 15th September 2017 recorded as under:

“Heard the learned counsel for the petitioner and perused the relevant material.

Delay condoned.

Issue Notice.

List the matter along with Special Leave Petitioner (Civil) No.9623 of 2017.

All amounts admitted to be due to the petitioner will be paid by the respondent- Corporation in the meantime.”

20. On 5th January, 2018, in several appeals/SLPs arising out of Order No.1, the Supreme Court passed the following order:

“Delay condoned.

In this group of cases some of the petitioners have been paid the principal amount and the earnest money whereas some of the petitioners have been paid only the principal amount. Some of the petitioners have not been paid even the principal amount. Such of the petitioners who have not been paid the principal amount/earnest money/security deposit be paid the amounts due under the aforesaid heads.

The present Special Leave Petitions have been filed against order(s) of the High Court which appears to be consent order(s). Disputes have been raised that the petitioners have not given their consent. We are not

inclined to go into the said aspect of the matter. However, we leave it open for the petitioners to agitate the said question before the High Court, if they are so advised.

With the aforesaid observation, the present Special Leave Petitions as well as all pending applications therein shall stand disposed of”.

21. The Supreme Court directed payments to be made to the Contractors who approached the Court by way of SLPs, “*in the meantime*”, on the first hearing. By the order disposing of the SLPs, the payment of Principal amount, Earnest money and Security deposit were directed to be made. This in effect meant that the said Contractors were not to stand in the queue but payments were released to them under Supreme Court orders. The Supreme Court did not adjudicate the matter on the question of interest or the question as to whether consent was given.

22. Thus, in effect, Order No.1 dated 1st December, 2016, to the extent that it gave sanctity to the queue system which was also subsequently followed by Learned Single Judges of this Court, appears to have been superseded by the Supreme Court insofar as the Queue system of payment is concerned. In any event, all the three issues on which consent had been initially recorded in order dated 1st December, 2016 i.e. payment of principal on queue basis, payment of interest only after three years and 90 days, as also security deposit, was open for re-agitation. Order No.1 was in effect modified in respect of the Contractors who approached the Supreme Court. Subsequent Orders No.2, 3 and 4 are passed on the basis of Order No.1. On the issues of law raised in those appeals and writs, there was no decision on merits.

23. It is settled as far back as in 1989, when the Supreme Court in ***Municipal Corporation of Delhi v. Gurnam Kaur (1989) 1 SCC 101*** held that consent orders do not adjudicate upon the merits of the dispute and hence do not constitute binding precedents. Relevant extract of the judgment is as under:

“10. It is axiomatic that when a direction or order is made by consent of the parties, the court does not adjudicate upon the rights of the parties nor does it lay down any principle. Quotability as ‘law’ applies to the principle of a case, its ratio decidendi. The only thing in a judge’s decision binding as an authority upon a subsequent judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative...”

This position taken by the Supreme Court has been followed by a Single Judge of this Court in ***Yash Sehrawat v. Board of Control for Cricket in India 2014 (141) DRJ 518***.

24. There are two different sets of appeals in this batch. The first batch of appeals are those in which the order dated 1st December, 2016 was passed in respect of the same work orders. The second set of appeals arises out of different work orders, though sometimes the contractors are the same. To the extent the appeals relate to the same work order, the parties shall be bound by the 1st December, 2016 order. However, the said order cannot apply in the second set of cases as the transactions are completely separate and distinct. The appeals arise out of completely different suits. Consent terms of different proceedings and transactions cannot be imposed. Moreover, even insofar as the first set of appeals are concerned, Contractors have pressed for

the relief of interest on Principal amounts. Order Nos.1 to 4 do not constitute precedents as they were based on the initial consent order which stood modified/merged in the orders passed by the Supreme Court. The question of consent was also left open by the Supreme Court for being re-agitated. Even in the first set of appeals where the issue of security deposit and interest thereon was left open by the order of 1st December 2016, Corporations argue that security deposit is not liable to be refunded until the final bill is passed – which can only happen as per the queue system, subject to availability of funds. This is not acceptable to Contractors who argue that refund of security deposit is not dependent on the passing of the final bill. Hence, the legal and factual issues in these appeals have to be adjudicated on their own merits.

Questions

25. The questions, therefore, that arise in this appeal and all the connected appeals are:

- (i) Whether payment of the principal amount can be delayed in view of Clause 7 and Clause 9 of the General Conditions of Contract read with the amendments?
- (ii) Whether the refund of earnest money/security deposit can be delayed in view of Clauses 17 and 45 of the General Conditions of Contract?
- (iii) Whether interest is payable on delayed payments/refunds and if so, for which period?

Question No. 1- Payment of Principal amount

26. Whenever tenders are called for and work orders are placed by the

Corporation, all Contractors are bound by the General Conditions of Contract. The said conditions are published by the Corporations and are "Standard Form". No deviation is usually permissible from the said General Conditions of Contract. Registered Contractors are aware of the General Conditions of Contract and apply for the tenders accordingly. They also execute the work orders, fully conscious of the General Conditions of Contract. However, the question that arises is whether the two clauses relating to non-payment of bills indefinitely, though the bills are passed by the Executive Engineer and non-payment of interest for delayed payment, would be legal and valid?

Clauses relied upon

27. The Corporations rely on Clauses 7 and 9 of the General Conditions of Contract, so do the Contractors. There are however, different versions of the said clauses, especially Clause 9. The work orders have been awarded post-2008. There is actually no clarity as to which version of the clause was applicable during which period and hence the latest clause is being applied uniformly in all cases. The Clauses relied upon by the Corporation are Clauses 7 and 9 of the General Conditions of Contract, which are reproduced below:

“CLAUSE 7

Payment on Intermediate Certificate to be Regarded as Advances:

No payment shall be made for work estimated to cost Rs. Twenty thousand or less till after the whole of the work shall have been completed and certificate of completion given. For works estimated to cost over Rs. twenty thousand, the interim or running account bills shall be submitted by the contractor for work executed

on the basis of such recorded measurement on the format of the department in the triplicate on or before the date of every month of the fixed for the same by the Engineer-in-Charge. The contractor shall not be the entitled to be paid any such interim payment if the gross work done together with the note payment/adjustment of advances of material collected, if any, since the last such payment is less then the amount specified in Schedule 'F' in which case the interim bill shall be prepared on the appointed date of month after the requisite progress is achieved. Engineer-in-charge shall arrange to have the bill verified by taking or causing to be taken, where necessary, the requisite measurement of the work. In the event of the failure of the contractor to submit the bills. progress is achieved. Engineer-in-Charge shall prepare or cause to be prepared such bills in which event no claims whatsoever due to delays on payment including that of interest shall be payable to the contract. Payment on account of admissible shall be made by the Engineer-in-Charge certifying the sum to which the contractor is considered entitled by the way of interim payment at such rates as decided by the Engineer-in-Charge. The amount admissible shall be paid by the 30th working day after the day of presentation of the bill by the contractor to the Engineer-in-Charge of his Asst. Engineer together with the account of the material is issued by the department, or dismantled materials, if any. The payment of passed bills will be subject to availability of funds in particular head of account from time to time in MCD. Payment of bills shall be made strictly on Queue basis the i.e. first the past liabilities will be cleared and after that the release of payment for passed bills be in order of the demand received at HQ under particular head of accounts. No interest shall be payable to the contractor in case of delay in payment on account of non-availability of fund in the particular head of

account of the MCD.

All such payment shall be regarded as payments by way of advances against final payment only and shall not preclude the requiring of bad, unsound and imperfect or unskilled work to be rejected, removed, taken away and reconstructed or re-erected. Any certificate given by the Engineer-in-Charge relating to the work done or materials delivered forming part of such payment, may be modified or corrected by any subsequent such certificates(s) or by the final certificate and shall not by itself be conclusive evidence that any work or materials to which it relates is/are in accordance with the contract and specifications. Any such interim payment or any part thereof shall not in any respect conclude, determine or effect in any way powers of Engineer-in-Charge under the contract or any of such payments be treated as final settlement and adjustment of accounts or in any way vary or effect the contract.

Pending consideration of extension of date of completion interim payments shall to be made as herein provides, without prejudice to the right of the departments to take action under the terms of this contract for delay in the completion of work, if the extension of date of completion is not granted by the competent authority.

The Engineer-in-Charge in his sole discretion on the basis of a certificate from the Asstt. Engineer to the effect that the work has been completed upto the level in question make interim advance payments without detailed measurements for work done (other than foundations, items to be covered under finishing items) upon lintel level (including sunshade etc.) and slab level, for each floor working out at 75% of the assessed value. The advance payment so allowed shall be adjusted in the subsequent interim bill by taking detailed measurements thereof.

CLAUSE-9 Payment of final bill

The final bill shall be submitted by the contractor in the same manner as specified in interim bills within three months of physical completion of the work or within one month of the date of the final certificate of completion furnished by the Engineer-in-Charge whichever is earlier. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payment of those items of the bill in respect of which there is no dispute and of items in dispute, for quantities and rates as approved by Engineer-in-Charge, will, as far as possible be made after the period specified hereinunder the period being reckoned from the date of receipt of bill by the Engineer-in-Charge or his authorised Asstt. Engineer, complete with account of material issued by the department and dismantled. The payment of passed bills will depend on availability of funds in particular head of account from time to time in MCD. Payment of bills shall be made strictly on Queue basis i.e. first the past liability will be cleared and after that the release of payment for passed bills will be in order of the demand received at the HQ and the particular head of account. No interest shall be payable to the contractor in case of delay in payment on account of non-availability of fund in the particular head of account of MCD.

- (i) If the tendered value of work is upto Rs. 5 lacs: 6 months*
(ii) If the tendered value of work exceeds Rs. 5 lacs: 9 months”

28. In addition, the Corporation also relies on the amendment to the General Conditions of Contract dated 19th May, 2006 which reads as under:

***“Addition to clause 7, clause 9 and clause 9A,
regarding payment of bills to the contractors***

The payment of passed bills will depend on availability of funds in particular head of account from time to time in MCD. Payments of bills shall be made strictly on Queue basis i.e. first the past liabilities will be cleared and after that the release of payment for passed bills will be in order of the demand received at HQ under particular head of account.”

29. A further Circular was issued on 10th June 2014 by the Office of Chief Engineer of the Corporation to the following effect:

“

CIRCULAR

Subject:- Implementation of various protection clause available in the General Terms & Conditions.

It has been brought to the notice of the Chief Law Officer that following clauses existing in the General Terms & Conditions are not taken care of while pleading cases before the arbitrators & ADJ Courts i.e. at first court level. It is a well settled law that a plea not taken up before the first court cannot be aggregated before the higher court i.e. the appellate court. The protection clauses are enumerated as under:-

1. Clause 7 : *It says that if the Contractor does not prepare and submit the bills, then Engineer-in-Charge of MCD will prepare the same and in such an event the contractor will not be entitled to any claims whatsoever due to delay in payment including that of interest.*

2. Clause 17: *The security deposit shall not be refunded before expiry of one year from the date of completion of work.*

3. Clause 45: *Security deposit shall not be refunded till the contractor produces clearance certificate from the Labour Officer.*

4. Clause 9: *Contractor will get payment of his passed bills depending upon availability of funds in particular head of account. Payment will be made strictly on*

queue basis. No interest will be payable to contractor in case of delay in payment on account of non-availability of funds in particular head of account of MCD.

All Chief Engineers are hereby requested to direct the concerned EEs to take care of above mentioned clauses of agreement while pleading Arbitration/Court Cases at initial level itself.

*Sd/-
Chief Engineer (Plg.)”*

30. On the basis of the above Clauses, amendment and Circular, the submission of the Corporation is that:

- a) For both advance payment and for final bills, the payment has to be certified by Engineer-in-Charge;
- b) The payment of the passed bills will be made subject to availability of funds in the specific head from time to time with the Corporation;
- c) The payment of bills shall be strictly made on queue basis;
- d) No interest shall be payable in case of delay in payment, on account of non-availability of funds.

31. On the other hand, it is the submission on behalf of the Contractors that since their clients, in these cases, have not given any consent they cannot be made to be bound by Orders 1-4. Further, it is their submission that the queue system was not followed by the Supreme Court in the SLPs, in respect of payment of Principal, Security deposit etc. Thus, it is their submission, that the present suits arise out of different transactions and consent has not been given by their clients. It is their further submission that even in those cases, the Supreme Court has reopened the issue of consent

itself and thus, the said orders cannot bind the contractors in these cases.

Analysis of the Clauses

32. Clause 7 of the General Conditions of Contract deals with the payment on the basis of intermediate certificates as advance payments and Clause 9 of the General Conditions of Contract relates to payment of final bills. In both cases, the Engineer-in-Charge has to certify the payments. So far there can be no issue. Obviously if payments have to be made to Contractors, the Engineer-in-Charge who is getting the work done has to certify that the work has actually been done on site and the material etc. for which payment is being executed has been duly employed in the works.

33. However, the quandary for the Contractor begins after the bills are passed by the Engineer-in-Charge. Clause 7 provides that the amount so certified shall be paid by the 30th working day after the presentation of the bill by the Contractor. However, thereafter comes the big caveat i.e. that the Corporation should have funds available with it under the specific head of account.

34. It is slightly unfathomable as to how the Corporation can postpone the payment to the Contractor, indefinitely. The issuance of the tender and the work order in favour of the Contractor has to be on the pre-condition that funds are available with the Corporation. To ask the Contractor to wait endlessly for his payment is wholly arbitrary. The Corporation which hands over the works contract to the Contractor cannot say “*Do the work now, I will pay when I have the money*”. Even if such a clause has been signed and accepted by the Contractor, it does not make the clause valid inasmuch as it would render a fundamental condition of contract being hit by provisions of

the Indian Contract Act, 1872 (*hereinafter*, ‘Contract Act’). Every contract, to be valid, has to have consideration and the indefinite postponement of consideration would be wholly unconscionable. In fact a Single Judge of this Court in ***Jagbir Singh Sharma v. Municipal Corporation of Delhi [order dated 15th July, 2007 in CS(OS) 1797/2007]*** (*hereinafter*, ‘Jagbir Singh’), while dealing with Clause 9 of the General Conditions of Contract (*as it then stood*) has held as under:

“7. ...A careful reading of the said clause indicates that it stipulates two different time periods for making payment. In cases where tendered value of the work is upto Rs.5 lakhs, payment is required to be made within three months and where the tendered value of the work exceeds Rs.5 lakhs, the payment is to be made within six months. Learned counsel for the defendant submitted that the contract uses the expression “as far as possible”. This expression to my mind supports the case of the Plaintiffs. The expression “as far as possible” is a pointer that every endeavor should be made by MCD to make payment within the time period stipulated in Clause 9. Normally and in due course, payments will be made within the time limit mentioned. The applications filed for leave to defend do not set out and give any reason for the delay in making the payments. Normally, payment should be made within a reasonable time after the contract has been executed and the party has performed his obligations under the contract. Section 46 of the Indian Contract Act, 1872 stipulates that where no time limit is specified, the engagement must be performed within a reasonable time.

8. In the applications for leave to defend, it is stated that payments will be made as and when funds in a particular budget head are available with the MCD. Ex facie, the stand taken in the leave to defend

applications cannot be accepted and has to be rejected. Once the defendant-MCD admits its obligation to make payment, the said payment has to be arranged for and budgeted for by them. The plaintiffs have no role to play in the said exercise. How the defendant manages their internal affairs is their own business. In fact, Clause 9 of the Contract stipulates that “as far as possible the MCD will make endeavor to make the payment within the said period”

35. The clause which the Court dealt with in the said case reads as under:

"CLAUSE 9

Payment of Final Bill

The final bill shall be submitted by the contractor in the same manner as specified in interim bills within three months of physical completion of the work or within one month of the date of the final certificate completion furnished by the Engineer-in-Charge whichever is earlier. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payments of those items of the bill in respect of which there is no dispute and of items in dispute, for quantities and rates as approved by the Engineer-in-Charge, will, as far as possible, be made within the period specified hereinunder, the period being reckoned from the date of receipt of bill by the Engineer-in-Charge or his authorized Asstt. Engineer, complete with account of materials issued by the Department and dismantled materials

- (i) If the Tendered value of work is upto Rs. 5 lakhs : 3 months*
- (ii) If the Tendered value of work exceeds Rs. 5 lakhs : 6 months "*

36. A perusal of the old Clause 9 reveals that there was an actual limit for making of payment i.e. 3 months and 6 months and in the context of the said

Clause, it was held in ***Jagbir Singh (supra)*** that “every endeavor should be made by MCD to make payment with the time period stipulated in Clause 9”. In the case of ***Jagbir Singh (supra)***, the Corporation, in its leave to defend application had submitted that payment would be made as and when funds in a particular budget head are available with it. This Court categorically rejected this stand of the Corporation by holding “*Ex facie, the stand taken in the leave to defend applications cannot be accepted and has to be rejected*”. This Court held that the Contractors have no role to play in the internal affairs of the Corporation. But a perusal of the present Clause i.e., the new Clause 9 of the General Conditions of Contract shows that what was expressly rejected by this Court, even as a defense in the leave to defend application in ***Jagbir Singh (supra)***, has now come to be added in the Clause itself along with a second element of a queue basis, which were not part of the earlier Clause and has now been made part of the new Clause. It is, however, completely incongruous that the addition of conditions of availability of funds and queue basis has been made, while at the same time retaining an upper limit of 6 months and 9 months as against the earlier 3 months and 6 months in Clause 9 of the General Conditions of Contract. Clause 9 is, therefore, in the teeth of the judgment of this court in ***Jagbir Singh (supra)*** and is nothing but an attempt to neutralize the said judgment. A Corporation which gets works executed cannot therefore include a term in the contract which is per se unconscionable and unreasonable as -

- a) There is no fixed time period as to when the funds would be available;

- b) There is also no fixed mechanism to determine as to when and in what manner the head of account is to be determined and as to how the contractor would acquire knowledge of these two facts;
- c) There is also no certainty as to how many persons are in the queue prior to the Contractor and for what amounts;
- d) There is enormous ambiguity in the receipt under the particular heads of accounts.

37. These clauses in effect say that the Contractor is left with no remedy if the Corporation does not pay for the work that has been executed. Such a Clause would be illegal and contrary to law.

38. Corporations which form a part of the State as envisaged under Article 12 of the Constitution have to conduct their activities in accordance with law and public policy. Instrumentalities of States ought to be saddled with a higher responsibility to behave reasonably and not arbitrarily. It can be no justification for a Corporation to claim that it would float the tender, it would issue the works contract, it would get the work executed, its Engineer would supervise the work, the Engineers would pass the bills, but yet no payment would be made. Such a luxury ought not to be available to anyone, even a private individual/corporation who enters into a contract, let alone a State Corporation.

39. While the Contractors have argued that they have an unequal bargaining power with the Corporation, the Corporation argues that these are commercial contracts and the Contractor has signed the contract with open eyes. In ***Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr. (1986) 3 SCC 156***, the Supreme Court held:

“89.The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and

unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances.

90. It is not as if our civil courts have no power under the existing law. Under Section 31(1) of the Specific Relief Act, 1963 (Act No. 47 of 1963), any person against whom an instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the court may in its discretion, so adjudge it and order it to be delivered up and cancelled.

91. Is a contract of the type mentioned above to be adjudged voidable or void? If it was induced by undue influence, then under Section 19A of the Indian Contract Act, it would be voidable. It is, however, rarely that contracts of the types to which the principle formulated by us above applies are induced by undue influence as defined by Section 16(1) of the Indian Contract Act, even though at times they are between parties one of whom holds a real or apparent authority over the other. In the vast majority of cases, however, such contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality of bargaining power. Such contracts will not fall within the four corners of the definition of "undue influence" given in Section 16(1). Further, the majority of such contracts are in a standard or prescribed form or consist of a set of rules. They are not contracts between individuals containing terms meant for those individuals alone. Contracts in prescribed or standard forms or which embody a set of rules as part of the contract are entered into by the party with superior bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which

affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable, are injurious to the public interest. To say that such a contract is only voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to court to have the contract adjudged voidable. This would only result in multiplicity of litigation which no court should encourage and would also not be in the public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void. While the law of contracts in England is mostly judge-made, the law of contracts in India is enacted in a statute, namely, the Indian Contract Act, 1872. In order that such a contract should be void, it must fall under one of the relevant sections of the Indian Contract Act. The only relevant provision in the Indian Contract Act which can apply is Section 23 when it states that "The consideration or object of an agreement is lawful, unless . . . the court regards it as . . . opposed to public policy."

92 . *The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy" or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognized head of public policy, the courts have not shirked from extending it to new transactions and changed*

circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought - "the narrow view" school and "the broad view" school. According to the former, courts can not create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities..... Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Driefontein Consolidated Gold Mines Limited 1902 A.C. 484 "Public policy is always an unsafe and treacherous ground for legal decision." That was in the year 1902. Seventy-eight years earlier, Burrough, J., in Richardson v. Mellish 1824 (2) Bing. 229; (s.c.) 130 E.R. 294 and 1824 All E.R. Rep 258, described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in Enderyby Town Football Club Ltd. v. Football Association Ltd. 1971 Ch. 591. "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles." Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "History of English Law", Volume III, page 55, has said:

In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to

suppress practices which, under ever new disguises, seek to weaken or negative them.

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.”

40. The question therefore would be as to whether the Court in this case should take a narrow view or a broad view. In **Brojo Nath Ganguly and Anr.** (*supra*), the Supreme Court clearly held that:

“The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void.”

41. Thus, the argument of ‘unequal bargaining power’ may not apply in commercial contracts of the kind, which are the subject matter of the present appeal. This however does not take away the important aspect of the contract i.e., that it is still a Standard Contract, signed by the Contractor on the dotted line. With most of the work orders, the General Conditions of the

Contract are not even attached. They are simply taken to be read and known to the Contractor. Even presuming that the parties are of equal bargaining power, the question is whether the clauses in such General Conditions stand the test of 'reasonableness'.

42. In ***Indian Oil Corporation Limited v. Nilofer Siddiqui & Ors. (2015) 16 SCC 125*** (hereinafter, '*Nilofer Siddiqui*'), the Supreme Court has, in the context of an LPG dealership and termination of the same, held as under:

"32. We agree with the contentions advanced by Mr. Sibal that Condition 8 of the letter of allotment is unconscionable as it gives IOCL an unfettered right to terminate the distributorship without assigning any reason. In the instant case, Respondent 2 is far weaker in economic strength and has no bargaining power with IOCL. At the time when the letter of allotment was issued, Respondent 2 had no other means of livelihood and was dependent on the grant of Indane Gas agency by IOCL for sustenance of himself and his family members. The letter of allotment contains standard terms and Respondents 2 and 3 had no opportunity to vary the same.

33. Condition 8 of the letter of allotment provides for unilateral termination of distributorship without assigning any reason which is liable to be read down in the light of Article 14 of the Constitution of India as well as observations made by this Court in Central Inland Water Transport Corpn. Ltd. case....."

43. In ***Nilofer Siddiqui (supra)***, the Court found that the distributorship had been terminated arbitrarily and unfairly. On the strength of Article 14 of the Constitution of India and the decision in ***Brojo Nath Ganguly and Anr. (supra)***, the Supreme Court read down the provisions of the condition of the contract that gave unfettered powers of termination to the IOCL and restored

the distributorship of the petitioner. Thus, irrespective of the bargaining power of the parties, the clauses of a contract have to abide by the test of reasonableness and have to be conscionable.

44. In the present case, the combined effect of the Clauses and the Circular and amendments, set out above, is that if the Corporation does not procure funds, it is not liable to even pay the Contractor any interest and the Contractor has no remedy. This by itself would mean that such a Clause could be read as leading to a contract without consideration and hence unlawful under Section 23 of the Contract Act. The Corporation being an instrumentality of State, such a contract would also be **opposed to public policy** under Section 23 of the Contract Act. Section 46 of the Contract Act is also clear that if no time for performance of a contract is specified, it has to be performed within a **reasonable** time. Reading these provisions together, it is clear that an open ended Clause which in effect says that the payment shall be made at an undetermined time in the future, subject to availability of funds, in a particular head of accounts is wholly unreasonable and such a term would also be unfair.

45. It is equally strange that the Corporation seeks to justify the non-payment on the ground of non-availability of funds for medicines or hospital items or pensions or salaries of the Corporation. Running the Corporation is not the business of the Contractor. It is for the Corporation to manage its affairs as per the funds available with it and it cannot be a defense that the Contractor should bear the brunt of non-payment for years, of works executed by him.

46. *Mrs. I.K. Sohan Singh v. State Bank of India AIR 1964 P&H 123*, involved a transaction of a sale deed wherein the balance sale consideration

was to be paid “*as soon as possible*” but at a time when the vendee is in a position to make the payment. The question arose as to whether the time prescribed for making the payment of balance consideration was reasonable. The Punjab & Haryana High Court, following the dicta of Justice Warrington in ***Watling v. Lewis 1911 1 Ch. 414***, held the balance sum ought to be paid within a reasonable time in view of Section 46 of the Contract Act. The Court held as under:

“9 . The words "as soon as possible" which preceded the words "but at a time when the former is in a position to make the payment" also relate to the time of payment. It was neither pleaded nor was it the case of the defendant that if she never had the financial resources or the means to make the payment of the amount of Rs. 25,000, she was to be altogether absolved from all liability to make payment of the balance amount of sale consideration. While construing the disputed contract embodied in the sale deed, the real covenant cannot be so construed that an absolute obligation arising under it can be allowed to be destroyed by a subsequent clause contained in the same deed. In re Tewkesbury Gas Company Tysoe v. The Company 1911 2 Ch.279, a company had issued a series of debentures each of which contained a covenant by the company that it would 'on or after' January 1, 1898, pay to' the registered holder of the debenture the principal sum thereby secured. The debenture then stated as follows: "The debentures to be paid off will be determined by ballot, and six calendar months' notice will be given by the company of the debentures drawn for payment." The company never paid off any of the debentures or held any ballot. In an action by one of the debenture-holders, it was held that on the construction of the covenant and in the events that had happened the principal money secured by the debenture was presently due and payable, and that, if

the provision as to balloting and notice meant that the company was never to be bound to pay off any debenture unless it elected to do so and balloted and gave notice accordingly, the provision was void for repugnancy on the principle stated in Sheppard's Touchstone, p. 273, and illustrated in Watting v. Lewis 1911 1 Ch. 414. In the latter case Warrington, J., came to the following conclusion:-

“The result is, I think, that first there is a covenant to pay the money and to indemnify, and then the parties have attempted to qualify that covenant by using words the effect of which, if effect is to be given to them, would be to destroy the personal liability. That being so, the words they have used can have no effect at law and the liability remains”.

10. *Consequently there is a good deal of force in the submission of Mr. Kapur that the true import of the stipulation in the sale deed with regard to payment of the amount of balance consideration of Rs. 25,000 was that the same would be payable within a reasonable time by virtue of the application of Section 46 of the Contract Act as it must be deemed that no time for performance had been specified. It may be mentioned that this view justifiably commended itself to the Court below.”*

47. A similar view is echoed in ***Hungerford Investment Trust Ltd. v. Haridas Mundhra and others*** AIR 1972 SC 1826 wherein it was held that though no specific time was provided for payment of purchase money, it has to be construed as reasonable time under Section 46 of the Contract Act. The Court, however, held that what is reasonable is a question of fact. The observation of the Supreme Court reads as under:

“25. It was contended on behalf of Mundhra that he was always ready and willing to pay the purchase money but since the decree did not specify any time for

payment of the money, there was no default on his part. In other words, the contention was that since the decree did not specify a time within which the purchase money should be paid and, since an application for fixing the time was made by the appellant and dismissed by the Court, Mundhra cannot be said to have been in default in not paying the purchase money so that the appellant might apply for rescission of the decree. If a contract does not specify the time for performance, the Law will limply that the parties intended that the obligation under the contract should be performed within a reasonable time. Section 46 of the Contract Act provides that where, by a contract a promissory is to perform his promise without application by the promisee and no time for performance is specified, the engagement must be performed within a reasonable time and the question "what is reasonable time" is, in each particular case, a question of fact. We have already indicated that the contract between the parties was not extinguished by the passing of the decree, that it subsisted notwithstanding the decree. It was an implied term of the contract and, therefore, of the decree passed thereon that the parties would perform the contract within a reasonable time. To put it in other words, as the contract subsisted despite the decree and as the decree did not abrogate or modify any of the express or implied term of the contract, it must be presumed that the parties to the decree had the obligation to complete the contract within a reasonable time."

48. Learned counsel for the Corporation has relied upon ***Bank of India v. K. Mohandas (2009) 5 SCC 313*** and ***Super Poly Fabriks Ltd. v. Commissioner of Central Excise, Punjab (2008) 11 SCC 398*** to argue that the contract has to be read as a whole. This position is not in dispute.

However, the contract has to be construed as per the principles contained in Section 46 of the Contract Act.

49. The learned counsel for the Corporation also relies upon ***Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Co. Ltd. (2011) 10 SCC 420*** (hereinafter, '*Cauvery Coffee Traders*') to argue that Contractors cannot approbate and reprobate. Since Contractors wanted to obtain benefits under the work order and the terms of the work order (including the General Conditions of Contract) were well known to them, they cannot then argue that "*I want the work order but without clause 7 & 9*". This argument would have been acceptable and appealing if the Clause under the contract had some reasonable time limit fixed for the payment to be made, while following a queue system. However, the Corporation argues that there is no time limit fixed at all. There are too many contingencies and conditions that are stipulated in order to make payment, namely:

- (i) funds should be available with the Corporation;
- (ii) funds should be available under specific head;
- (iii) the Contractors' turn to be paid should arise; and
- (iv) Interest would not be paid for the delayed period.

50. These four conditions are so vague and ambiguous into the future that at no point would a Contractor, who had executed the work order, be able to demand payment. On the one hand, the Contractor is expected to obtain all the construction material at his own expenses, employ labour at his own expenses and execute the work order. Thereafter, he has to submit his bills to the Corporation and the Engineer-in-Charge has to pass the said bills. So far, the conditions are reasonable. However, to say that even after the bills are passed the payment would be made if and when the funds are available,

if and when Contractor's turn comes, is in effect to say that it would make the payment in 1 year, 5 years, 10 years or not pay at all. Such a condition in any contract would be illegal, unconscionable and unreasonable. There is no question of estoppel by election in such a case. In ***Cauvery Coffee Traders (supra)*** the Supreme Court's observation on approbate and reprobate was in the context of a transaction that stood concluded '*after extensive and exhaustive bilateral deliberations*'. The position in the present cases is the opposite. Here it is a standard form contract which is to be accepted without much choice. The only choice before a Contractor is simply to not to apply for or accept the work order itself. Thus, the authority cited on this proposition would not apply.

51. The counsel for the Corporation also relies upon ***New Bihari Biri Leaves Co. v. State of Bihar (1981) 1 SCC 537*** to submit that once a party has accepted the terms of the contract and takes the advantage of the terms which are in his favour, he cannot then repudiate the other parts of the contract. This is again a general principle. The payment of consideration goes to the root of a contract. Without consideration, there is no valid contract. The contractor, apart from having the work orders placed on him, and making the deposit of the earnest money/security amount has executed the contract after making his own expenditure in terms of the material used and the payments to labour and other overheads. Under the contract entered into with the Corporation apart from placing of the work order and hoping of clearance of the final bills, there is no other term of which the other Contractor has taken advantage of. Any term of the contract has to be construed within the four corners of law. A term in a contract which is

contrary to law has to be interpreted as per the applicable provisions. In that sense, there is no repudiation by the Contractor.

52. On the word 'reasonable' the Corporation relies on ***Veerayee Ammal Vs. Seeni Ammal AIR 2001 SC 2920***. Even in the said judgment the Supreme Court holds:

"13. The word "reasonable" has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word "reasonable". The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the "reasonable time" is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means as soon as circumstances permit. In Law Lexicon it is defined to mean:

"A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than 'directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea."

Thus, the reasonableness has to be seen from the facts of each case.

53. A harmonious interpretation of the Clauses in the General Conditions of Contract and the amendment of 2006, has to be made, failing which, the Clauses would be contrary to law and to the basic principles of valid contracts. An indefinite open ended Clause for making payment would be unreasonable and hence contrary to Section 46 of the Contract Act. Reading the contract as a whole with the amendment of May, 2006, it is clear that insofar as payment under Clause 9 of the General Conditions of Contract is concerned, the Corporation itself specifies the time for payment of the final bills as 6 months and 9 months. Thus, the contract itself considers and specifies the reasonable time. However, the same is sought to be diluted by specifying that this period shall be adhered to 'as far as possible'. The queue system and availability of funds are deemed by the Corporation to override the 6 months and 9 months period. There is no reason as to why the court should consider that the intention was to prescribe no upper limit for making of payment and leave the period for payment as an open ended one.

Order XII Rule 6

54. Further reliance has also been placed on a number of orders in respect of Order XII Rule 6 and as to when a decree on admission can be passed. In the present case, no oral evidence is actually required to be adduced. The awarding of the contract is not disputed. The execution of the contract is not disputed. The final bill having been passed by the Engineer-in-Charge is not disputed. What is disputed is the time when the payment is to be made. This is only a matter of interpretation of the Clauses of the General Conditions of Contract. In cases where there are factual disputes, evidence can be led to adjudicate those facts. However, in the present cases, there being no factual

dispute and only a question of application of the Clauses of the General Conditions of Contract and their interpretation is involved, the approach of the Trial Court in applying Order XII Rule 6 of the CPC cannot be faulted.

55. It is the settled position in law, even in the authorities cited by the Corporation that when the pleadings are clear, they constitute admission. A reading of the written statement shows that the Corporation does not seriously dispute the passing of the final bills and the amount of Security deposited. Only the interest component is seriously disputed.

56. As per *Himani Alloys Ltd. v. Tata Steel Ltd. (2011) 15 SCC 273* cited by the Corporation, the test for the invoking of Order XII Rule 6 of the CPC being that the admission so made must clear and unequivocal, on the face of which it is impossible for the party making it to succeed. In the light of the stand in the written statement, there is a clear admission as to the final bill amount as also that the Contractor has to wait in a queue. Thus the Trial Court has rightly invoked the provisions of Order XII Rule 6.

Conclusions and Findings

57. The General Conditions of Contract i.e., clauses 7 and 9 which are admittedly part of the work orders issued by both the NrDMC and the EDMC are being tested in these batch of cases. A contract which stipulates that the consideration would be paid in an unforeseen time in the future based on certain factors which are indeterminable, would in effect be a contract without consideration. Even if the contract is held to be a valid contract, then the concept of 'reasonableness' has to be read into the same. Section 46 of the Contract Act and the explanation thereto is clear that "*what is a reasonable time is a question of fact in each case.*" A

Corporation which gets works executed cannot therefore include terms in the contract which are per se unconscionable and unreasonable as -

- a) There is no fixed time period as to when the funds would be available;
- b) There is also no fixed mechanism to determine as to when and in what manner the head of account is to be determined and as to how the Contractor would acquire knowledge of these two facts;
- c) There is also no certainty as to how many persons are in the queue prior to the Contractor and for what amounts;
- d) There is enormous ambiguity in the receipt under the particular heads of accounts.

58. These clauses in effect say that the Contractor is left with no remedy if the Corporation does not pay for the work that has been executed. Such a Clause would be illegal and contrary to law. Such clauses, even in commercial contracts, would be contrary to Section 25 read with Section 46 of the Contract Act.

59. The clauses do not specify an outer time limit for payment. The expression reasonable time has to be 'a time'. The concept of time itself is ensconced with specificity and precision. Clause 9 is the opposite of being precise. It is as vague and ambiguous as it could be because it depends on factors which are totally extraneous to the contract, namely -

- Allotment of funds to the Corporation by the Government;
- Allotment of funds in a particular head;
- Allotment of funds for payments who are in queue prior to the contractor;

60. Thus, these factors, which are beyond the control of the Contractor

and which would govern the payment of consideration, make the said clauses of the contract completely unreasonable. The clauses have to thus, be read or interpreted in a manner so as to instill reasonableness in them.

61. By applying the above said principles, in respect of final bills raised by Contractors for works executed, that have been approved by the Engineer-in-Charge, the Clauses have to be read in the following manner:

- a) Reasonable time for making of payments of final bills in respect of work orders up to Rs.5 lakhs shall be 6 months and work orders exceeding Rs.5 lakhs shall be 9 months from the date when the bill is passed by the Engineer-in-Charge.
- b) The queue basis can be applicable for the payments to be made in chronology. However, the outer limit of 6 months and 9 months cannot be exceeded, while applying the queue system.
- c) The payments are held to become due and payable immediately upon the expiry of 6 months and 9 months and any non-payment would attract payment of interest for the delayed periods.
- d) A conjoint reading of Clauses 7 & 9 along with the amendment dated 19th May, 2006, clearly shows that for the payment of bills, the contractors have to follow the queue basis and as and when the amount is available under the particular head of account, the amount would be payable. The amendment does not, however, have a condition that no interest is payable for delayed payment. Such a condition exists only in Clause 7. Clause 9, therefore, when read with the amendment has to mean that the Corporation itself considers 6 months and 9 months to be the reasonable periods for which the payments of the final bills can be held back.

e) To the extent that queue basis is applied only for clearing of payments which do not extend beyond the period of 6 months and 9 months period, it is reasonable. However, if the queue basis is applied in order to make Contractors wait for indefinite periods for receiving payments, then the same would be unreasonable and would have to therefore be read down.

Final decree on facts

62. The Trial Court thus rightly decreed the suit in respect of the admitted principal amount, under the provisions of Order XII Rule 6. Insofar as the refund of the security amount etc is concerned, the Trial Court left the same to be adjudicated after trial. By this appeal, order dated 24th January, 2017, which came to be passed in the application filed by the Contractor under Order XII Rule 6 of the CPC, has been challenged. The suit is however still pending in respect of the other issues including refund of security amount, payment of interest etc., From a perusal of the trial court record, it appears that during the pendency of the appeal, payments towards two work orders have already been made. So the decree is being modified to the said extent.

63. On the basis of the pleadings between the parties and the reasoning and findings given above, the Contractor's suit is liable to be decreed for the Principal amount of Rs.18,34,188/- towards the work orders nos. 233, 234, 87, 88, 86 and 232. If any further sums have been paid, the appropriate amount shall be liable to be deducted;

64. The Corporation is directed to make the payments within a period of eight weeks thereafter, failing which, interest @ 12% p.a. would be payable upon the expiry of the said period till date of payment.

65. The impugned judgment/decreed is modified in the above terms. Decree sheet be drawn accordingly. Appeal stands disposed of with no order as to costs to costs.

66. By way of separate order passed today in these appeals, certain guidelines are issued. These guidelines shall be read alongwith the judgment pronounced today in all these appeals.

PRATHIBA M. SINGH, J.
Judge

MARCH 22, 2018/uj



\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RFA Nos.160/2017, 167/2017, 171/2017, 208/2017, 136/2017, 56/2017, 58/2017, 50/2017, 53/2017, 166/2017, 573/2017, 571/2017, 570/2017, 397/2017, 42/2017, 43/2017, 419/2017, 420/2017, 421/2017, 422/2017, 425/2017, 427/2017, 429/2017, 430/2017, 431/2017, 432/2017, 434/2017, 436/2017, 437/2017, 438/2017, 439/2017, 440/2017, 443/2017, 444/2017, 445/2017, 447/2017, 558/2017, 563/2017, 574/2017, 410/2017, 418/2017, 1009/2016 & 560/2017

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER

%

22.03.2018

These are a batch of appeals which have arisen out of disputes between Contractors/Plaintiffs (*hereinafter*, 'Contractors') on the one hand and the North Delhi Municipal Corporation (*hereinafter*, 'NrDMC') and East Delhi Municipal Corporation (*hereinafter*, 'EDMC'), on the other. NrDMC and EDMC are collectively referred to as '*Corporations*'. The facts in each appeal are different and hence separate judgements are being passed in each of the appeals.

The present guidelines are being issued in all the appeals. The Court has had the opportunity of perusing the trial court records in all these 43 appeals. A perusal of the records reveals the following:-

1. In most cases, the Contractors who are awarded the work orders do not submit the interim or final bills to the Engineer-in-Charge for approval;
2. The final measurement recordal is done by the Engineer-in-Charge;
3. The final bill is also prepared and passed by the Engineer-in-Charge on his own accord and the Contractor then accepts it;

4. The procedure for obtaining labour clearance certificate from the Labour Officer is not followed;
5. Once the bills are passed, Contractors are made to wait endlessly for their payments on the ground of non-availability of funds;
6. Even for refunds of Security Deposit and Earnest money deposits, the Contractor is made to wait till the final payment is made;
7. The measurement books and the photographs of work, actually carried out, are not produced in evidence.

The above process is contrary to the General Conditions of Contract. It is therefore, necessary and important that all the steps of the Contract are followed by the Contractors and the Corporations. The following guidelines are being passed:

1. Along with the work order, all the Clauses of the General Conditions of Contract should be attached;
2. On the award of the Work order, periodic inspections of the work being carried out should be done by the Engineer-in-Charge;
3. If possible, photographs of the works at different stages should be taken and maintained on the record;
4. Interim bills should be submitted by the Contractor – duly certifying the work which has been carried out;
5. Final bills should be submitted by the Contractor – duly certifying the work carried out along with photographs;
6. The Bill should be scrutinised by the Engineer-in-Charge, works should be recorded in the measurement book and thereafter, the bill should be passed;

7. Once the Bill is passed, the payment schedule of 6 months and 9 months should be adhered to. Delay in payments would result in Interest being levied;
8. For refunds of Security deposit and Earnest Money deposit, the Contractor should unscrupulously comply with the conditions in Clauses 17 and 45. For refunds to be made, payment of final bill need not be awaited. Once the conditions of Clauses 17 and 45 are complied with and the final bill is passed, refunds ought to be made;
9. In suits relating to recovery of Contractor's dues, all the evidence including the NIT, General Conditions of Contract, periodic inspection reports, Final bill as submitted, Final bill as passed, Measurements carried out, Photographs etc., should be produced and duly exhibited.
10. IT infrastructure ought to be created to maintain records of the work orders, inspection reports, final bills, photographs etc., digitally, as it is noticed that the trial court record does not contain all the relevant documents and in several cases, different versions of clauses are relied upon by both sides, bills are not properly understandable and there is no evidence of actual inspections or measurements having been taken. Maintenance of digital records will make it more transparent and easily accessible for the officials and for production in the Court in case of future litigation.

Adherence to the above shall ensure that the works are duly carried out as per the quality standards prescribed and there is proper record of work being done. Once the work is carried out payments ought not to be delayed,

inasmuch as delay in payments compromises on availability of quality civil work for the Corporations, who take care of basic amenities for citizens such as roads, pavements, civil works, sewerage lines etc.

These guidelines shall be read along with the judgments pronounced today in these appeals.

PRATHIBA M. SINGH, J.
Judge

MARCH 22, 2018/Rahul/dk

