

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: October 23, 2018

+ W.P.(C) 8197/2017 & CM. No. 33688/2017

MI2C SECURITY FACILITIES PVT LTD

..... Petitioner

Through: Mr. Rajesh Gogna and
Mr. Akhilesh Kumar, Advs.

versus

NORTH DELHI MUNICIPAL CORPORATION

..... Respondent

Through: Mr. Gaurang Kanth and
Ms. Biji Rajesh, Advs.

**CORAM:
HON'BLE MR JUSTICE V. KAMESWAR RAO**

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed by the petitioner with the following payers:

“It is, therefore, most humbly prayed that this Hon’ble Court may most graciously be pleased: -

- a. Issue appropriate writ of mandamus or any other appropriate writ.*
- b. Pass appropriate order (s) or direction (s) against the Respondent to ensure compliance of its constitutional / statutory / contractual obligations to pay / release*

incremental wages which includes Minimum Wages / revised Minimum Wages, Provident Fund / revised Provident Fund, ESI / revised ESI for more than 400 employees employed to provide security services at ADC Headquarter, North Delhi Municipal Corporation, situated at Dr. S.P.M. Civic Centre, New Delhi.

- c. *Grant any other relief which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case along with cost in favour of the petitioner.*

It is prayed accordingly."

2. From the perusal of the prayer clause, it is noted that the petitioner is seeking a direction against the respondent Corporation to comply with the statutory obligation to pay / release incremental wages including minimum wages, Provident Fund, ESI etc. to the persons provided by it to the Corporation at Dr. S.P.M. Civic Centre, New Delhi (Centre in short) in furtherance of a contract of security work awarded to it. It is the submission of Mr. Rajesh Gogna, learned counsel for the petitioner that the petitioner participated in the NIT floated by the North Delhi Municipal Corporation ('Corporation' in short) for providing security services at the Centre on May 15, 2014. Vide communication dated November 12, 2014, the petitioner was awarded the contract by the Corporation to provide security services at the centre and the same was accepted by the petitioner on November 12, 2014 itself. He submitted, that on November 25, 2014, a contract agreement was executed by the parties. It is his submission that at the time of engagement of workers by the petitioner for the security work of the respondent Corporation,

the provident fund was being deducted at 13.61% on an amount of ₹6,500/- from the monthly wages but the said ceiling was changed by the Department of Provident Fund to 13.36% on ₹15,000/- with effect from September 01, 2014 vide their notification dated August 28, 2014. According to him, at the time when the petitioner was awarded the contract in the month of December, 2014, the minimum wages per person / per shift / per day was ₹367/- for Security Guards and ₹403/- for Armed Security Guards and Security Supervisor respectively. On March 31, 2015, the minimum wages for the Security Guards and Security Supervisor were enhanced by the Govt. of NCT of Delhi vide its notification dated March 31, 2015 to ₹385/- per day in respect of Security Guards and ₹423/- per day for Armed Security Guards and Security Supervisor respectively with effect from April 01, 2015. He also submitted that the minimum wages of the Security Guards and Security Supervisor were further enhanced by the Govt. of NCT of Delhi vide notification dated October 16, 2015 to ₹390/- per day in respect of Security Guards and ₹429/- per day for Armed Security Guards and Security Supervisor respectively with effect from October 01, 2015. He submitted that there was a further increase in the minimum wages vide notification dated March 31, 2016 to ₹407/- per day in respect of Security Guards and ₹447/- per day for Armed Security Guards and Security Supervisor respectively with

effect from March 01, 2016. He submitted that there was a further increase to ₹414/- per day and ₹455/- per day for the same set of personnel with effect from October 01, 2016. It is noted that there was a further increase to ₹565/- and ₹622/- with effect from April 01, 2017 vide notification dated March 03, 2017 and further increase to ₹575/- and ₹633/- with effect from April 01, 2017 vide notification dated May 31, 2017. According to Mr. Gogna, because of the increase in the minimum wages, the petitioner vide letter dated April 25, 2015 requested the respondent that the enhanced minimum incremental wages as indicated above should be released / paid to the petitioner and even the Provident Fund and the ESI be deposited with the concerned department at the enhanced minimum wages but the respondent did not pay the revised minimum wages or deposit the statutory benefit on revised wages. He refers to letters dated April 25, 2015, June 16, 2015, September 15, 2015, July 30, 2017 and July 31, 2017 in this regard. He has also drawn my attention to various letters written by the petitioner seeking various amounts.

3. According to Mr. Gogna, as per the terms and conditions of the tender / contract, the respondent was under obligation to pay the minimum wages, provident fund, ESI, Bonus and other statutory obligation to the security guards deployed by the petitioner at the Centre. It is his case that the terms and conditions of the tender and the contract also stipulated, in case the

minimum wages are revised by the Govt. of NCT of Delhi, the incremental wages will be provided by the respondent. In this regard he draws my attention to clause 8.3 of the NIT (page 44 of the paper book); Note-I (Page 49 of the paper book); clauses 4 and 5 of the Contract dated November 20, 2014 (page 74 of the paper book). He submitted, the total price bid was in terms of the wages stipulated, multiplied by the number of persons employed. As per him, the comparative chart of incremental wages, which the workers deployed by the petitioner were entitled to between the period April 01, 2014 to April 01, 2017, is as follows:-

“24. The comparative chart of the minimum wages applicable to the petitioners and other workers employed in the North Delhi Municipal Corporation at the time of their engagement and on the date of filing the present petition is as follows:-

<i>Date and Number of Notification</i>	<i>Minimum wages for semi-skilled workers (Security Guard) per day / per month in (Rs)</i>	<i>Minimum wages for skilled workers (Armed Security Guards and Security Supervisor) per day /per month in (Rs)</i>
<i>F.No.12(142)/2/MW/VII/5681 dated 28.03.2014</i>	<i>363/9438</i>	<i>399/10374</i>
<i>F.No.12(142)/2/MW/VII/5063 dated 10.11.2014</i>	<i>367/9542</i>	<i>403/10478</i>
<i>F.No.12(142)/13/MW/VII/348 dated 31.03.2015</i>	<i>385/10010</i>	<i>423/10998</i>
<i>F.No.12(142)/13/MW/Lab/2231 dated 16.10.2015</i>	<i>390/10140</i>	<i>429/11154</i>
<i>F.No.12(142)/13/MW/Lab/3998 dated 31.03.2016</i>	<i>407/10582</i>	<i>447/11622</i>

<i>F.No.12(142)/13/MW/Lab/8184 dated 30.09.2016</i>		<i>414/10764</i>	<i>445/11830</i>
<i>No.F. addl. LC/Lab/MW/2016/4859 dated 03.03.2017</i>		<i>565/14698</i>	<i>622/16182</i>
<i>No.F. addl. LC/Lab/MW/2016/466 dated 31.05.2017</i>		<i>575/14698</i>	<i>633/16182</i>

25. That despite the raising of the ceiling by the Provident Fund Department from Rs.6,500/- to Rs.15,000/-, the Petitioner was / is paying the 400 workers deployed by the petitioner were being paid the provident fund @ 13.61% of Rs.6,500/- whereas they are entitled for payment of Provident Fund @ 13.36% of the enhanced ceiling of the minimum wages.

26. That the workers deployed by the petitioner were entitled for incremental wages with every increase of the minimum wages and the percentage of ESI, Provident Fund etc. thereon. The comparative chart of the incremental wages which the worker deployed by the petitioner were entitled to in between the period 01.04.2014 to 01.04.2017 are as follows:

<i>Sl. No.</i>	<i>Date</i>	<i>Category</i>	<i>Applicable Minimum Wages per day/ per month</i>	<i>Applicable Provident Fund</i>	<i>Applicable ESI</i>	<i>Bonus</i>
<i>1</i>	<i>1.4.2014</i>	<i>Security guards/</i>	<i>363/9438</i>	<i>@13.61% of 6500=</i>	<i>@4.75% of 9438</i>	<i>291.55</i>
		<i>Armed Security Guards / Supervisor</i>	<i>399/10374</i>	<i>@13.61% of 6500=</i>	<i>@4.75% of 10374</i>	<i>291.55</i>
<i>2</i>	<i>1.10.2014</i>	<i>Security guard/</i>	<i>367/9542</i>	<i>@13.36% of 9542</i>	<i>@4.75% of 9542</i>	<i>291.55</i>
		<i>Armed Security Guards /</i>	<i>403/10478</i>	<i>@13.36% of 10478</i>	<i>@4.75% of 10478</i>	<i>291.55</i>

		<i>Supervisor</i>				
3	1.4.2015	<i>Security guards/</i>	385/10010	@ 13.36% of 10010=	@4.75% of 10010	291.55
		<i>Armed Security Guards / Supervisor</i>	423/10998	@ 13.36% of 10998=	@4.75% of 10998	291.55
4	1.10.2015	<i>Security guard /</i>	390/10140	@ 13.36% of 10140	@4.75% of 10140	291.55
		<i>Armed Security Guard / Supervisor</i>	429/11154	@ 13.36% of 11154	@4.75% of 11154	291.55
5	1.4.2016	<i>Security guards/</i>	407/10582	@ 13.36% of 10582	@4.75% of 10582	291.55
		<i>Armed Security Guards / Supervisor</i>	447/11622	@ 13.36% of 11622	@4.75% of 11622	291.55
6	1.10.2016	<i>Security guards/</i>	414/10764	@ 13.36% of 10764	@4.75% of 10764	291.55
		<i>Armed Security Guards / Supervisor</i>	455/11830	@ 13.36% of 11830	@4.75% of 11830	291.55
7	1.4.2017	<i>Security guards/</i>	565/14698	@ 13.36% of 14698	@4.75% of 14698	291.55
		<i>Armed Security Guards / Supervisor</i>	622/16182	@ 13.36% of 16182	@4.75% of 16182	291.55
8	1.4.2017	<i>Security guards/</i>	575/14958	@ 13.36% of 14958	@4.75% of 14958	291.55
		<i>Armed Security Guards / Supervisor</i>	633/164478	@ 13.36% of 164478	@4.75% of 164478	291.55

4. He submitted that the respondent is liable to pay the aforesaid amount,

which it has declined to pay despite many requests and the same is in violation of Article 23 of the Constitution of India as being a State and also a Principal employer denying minimum wages is patently unfair. In other words, the Corporation being a model employer, is required to ensure socio-economic justice. That apart, Mr. Gogna, during his submissions has drawn my attention to an affidavit filed by the petitioner on November 14, 2017 to contend that the respondent is resorting to pick and choose policy by denying the benefit of revised minimum wages to the petitioner as in the case of M/s NIELIT, they have enhanced the minimum wages of the employees, provided by the NIELIT to the Corporation. He also replied to the stand taken by the respondent that there being an arbitration clause in the agreement / contract, writ petition is not maintainable by contending that the arbitration clause is not a bar for the maintainability of the writ petition. In this regard, he relied on the judgment of the Supreme Court in the case of ***Union of India and Ors. v. Tania Construction Pvt. Ltd.*** 2011 (3) RAJ 424. He also distinguished the judgment relied upon by the counsel for the respondent in the case of ***The Empire Jute Co. Ltd. & Ors. v. the Jute Corporation of India Ltd. & Anr.*** in ***Civil Appeal NO. 4877 of 2007*** decided by the Supreme Court by contending that the judgment is contextual, was in peculiar facts and circumstances of the case, but even in the said judgment of the Supreme Court has held that the Court should use its discretion in favour of the arbitration when it is a pure-

question of law and *lis* involves public law character. He would rely upon Paras 19 and 20 of the judgment. He had also submitted that there are no disputed question of facts in the case in hand as alleged by the respondent. He supports the maintainability of the petition in the manner filed in this court. He would rely upon the following judgments:

1. *Mi2c Security and Private Limited v. Government of NCT & Ors.*: 2013 SCC Online Del 3906

2. *State of Jharkhand v. Harihar Yadav*: 2013 (15) JT 218

3. *Union of India & Anr. v. S.B. Vohra and Ors.*: (2004) 2 SCC 150

4. *Centre for Environment & Food Security v. Union of India and Ors.*: (2011) 5 SCC 676

5. *Ramjee Power Construction Ltd. v. Union of India and Ors.*: 2006 (86) DRJ 304

5. On the other hand, Ms. Biji Rajesh, learned counsel appearing for the respondent corporation submitted that in view of the arbitration clause in the agreement / contract, the remedy for the petitioner is to invoke the said clause in terms thereof and this court would not entertain the petition. In this regard, she submitted that the contract being a creation of the parties, who have mutually agreed to refer their future disputes to arbitration, this court contrary to such stipulation would not entertain the petition. That apart it is her case, that there are disputed question of facts which need to be decided on the basis

of evidence to be produced by both the parties. That apart any interpretation of a provision / stipulation in the contract would at best be decided through the process of Arbitration. It is appropriate that the petitioner should be relegated to the process of Arbitration by dismissing the present petition. She would refer to the judgment of the Supreme Court in the case of ***Bareilly Development Authority v. Ajai Pal Singh AIR 1989 SC 1076*** in support of her submission to contend that it is a settled legal proposition that matters / disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution of India. On the same proposition she also relied upon the judgment in the case of ***Rajasthan State Industrial Development and Investment Corporation and Anr. v. Diamond and Gem Development Corporation Ltd. and Anr. 2013 5 SCC 470***. Even on merits, it was her submission that contractual clauses have to be interpreted by considering the entire contract together. According to her, the agreement entered on November 20, 2014 between the parties adopted the terms and conditions of the notice inviting the tender. Thus, in order to interpret the clauses of this agreement, the same have to be read with the terms of the agreement. It was submitted by her that under clause 8.3, it has been clearly specified that the statutory liability of minimum wages would have to be included in the bids and the rates quoted by the bidder. Further, in clause 8.3.3 it is further elaborated that the rates and the quotes should be

responsive and should include the component of minimum wages. It was her submission, the petitioner who relied upon clause 5 of the agreement had overlooked the other clauses which clearly reveals intention of the parties. In fact the petitioner had tried to evade its responsibility of paying its workmen, the statutory minimum wages by misinterpreting a contractual clause and tried to shift the burden on the respondent. Clause 5 is a mere repetition of Note-I of the notice of tender. On a reading of both of them, it is clear that the obligation of paying minimum wages is on the petitioner. Even as per its own, admission, the petitioner had stated in a situation where the petitioner failed to pay the minimum wages, the respondent had to make the payment on their behalf and then recover the same from the bills of the petitioner. She draws my attention to Page 13, Para 7 of the writ petition. According to her, this leads to undeniable conclusion that the intention of the respondent as provided in the contract that the incidence of statutory obligation of paying minimum wages will fall on the petitioners was clear to the petitioner from the beginning.

6. Ms. Biji Rajesh has controverted the plea of Mr. Gogna of pick and choose policy of the respondent by stating that the said benefit was given in the case of employees engaged by NIELIT by stating that the same was in consonance with the terms and conditions of the Contract. In other words, the provisions of the Contract between the Corporation and the NIELIT are

different from those of the Contract between the petitioner and Corporation. The Contract specifically provides for different categories of IT professionals on purely contractual basis to perform various functions. The Contract under Sub-Section 3 Sub-Clause C specifically provides that Corporation will be liable to provide for the minimum wages of the workers whereas in the present case Clause 5 of the Agreement if read simultaneously with other provisions of the Agreement including Clause 8.3 of the NIT, it is evident that the obligation to provide for the minimum wages falls on the petitioner. She would rely upon the following judgments in support of her contention:-

- (i) ***The Empire Jute Co. Limited & Ors. v. The Jute Corporation of India Ltd. & Anr. 2007 (14) SCC 680;***
- (ii) ***Harbanslal Sahnia & Anr. V. IOCL 2003 (2) SCC 107;***
- (iii) ***Whirlpool Corporation v. Registrar of Trade Mark AIR 1999 SC 22;***
- (iv) ***Bareilly Development Authority v. Ajai Pal Singh AIR 1989 SC 1076;***
- (v) ***State of U.P. v. Bridge & Roof co. (India) Ltd. AIR 1996 SC 3515;***
- (vi) ***The Rajasthan State Industrial Development and Investment Corporation and Anr. V. Diamond and Gem Development Corporation and Anr. 2013 (5) SCC 470.***

7. Having heard the counsel for the parties, the foremost issue which arises for consideration is whether in view of clause 57 of the contract relatable to dispute resolution, the present petition is maintainable. The Clause 57 reads as under:

“57. Any dispute and or difference arising out of or relating to this

contract will be resolved through joint discussion of the authorities representatives of the concerned parties. However, if the disputes are not resolved by joint discussions, then the matter will be referred for adjudication to a sole Arbitrator appointed by the Commissioner, North Delhi Municipal Corporation.

8. There is no dispute that the respondent Corporation had initially filed a short affidavit followed by a reply to the additional affidavit filed by the petitioner. The short affidavit was on the merit of the controversy which falls for consideration in the writ petition. So, it follows the short affidavit to the writ petition and reply affidavit to the additional affidavit filed by the petitioner are the first statement on the dispute without resorting to the provisions of Section 8 of the Arbitration and Conciliation Act. If that be so, the respondent having submitted itself to the jurisdiction of this Court / waived its right to invoke Arbitration, cannot contend that the parties herein should be relegated to Arbitration in view of the existence of an Arbitration clause.

9. This proposition of law is well settled by the Supreme Court in the case of ***Rashtriya Ispat Nigam Limited vs. M/S Verma Transport Company, (2006) 7 SCC 275*** wherein it held that the expression “*first statement on the substance of the dispute*” contained in Section 8(i) of the Act is different from the expression “*written statement*”. It held, it employs submission of the party making the application under Section 8 of the Act, to the jurisdiction of the Judicial Authority. What should be decided by the Court is whether the

party seeking reference to arbitration has waived its right to invoke Arbitration. The Supreme Court also held, that if an application is filed before actually filing the first statement on the substance of the dispute, then the party cannot be said to have waived its right or acquiesced itself to the jurisdiction of the Court. So, what is, therefore, material is as to whether the petitioner has filed its first statement on the substance of the dispute or not, if not its application under Section 8 of the 1996 Act may not be held wholly unmaintainable. In the case in hand, even though, the affidavit has been referred to as a short affidavit, the respondent has actually submitted the affidavit on the merit of the dispute. Having done that despite taking a plea with regard to arbitration clause, it must be construed that the same does indicate that the respondent Corporation has showed its intention to submit itself to the jurisdiction of the Court. This has also been held by the Supreme Court in the case of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532 wherein in para 25, it held not only filing of the written statement in a suit but filing of any statement, application, affidavit by a defendant prior to the filing of the written statement will be construed as submission of a statement on the substance of the dispute if by filing such statement / application / affidavit the defendant shows his intention to submit himself to the jurisdiction of the Court and waived his right to seek reference to Arbitration.

10. It may also be stated here, the short affidavit filed by the petitioner was surely not opposing an interim relief or any connected proceedings and but for the writ petition. Similarly, a Coordinate Bench of this Court in the case of ***M/S S.D.Buildwell Pvt.Ltd. vs. Rail Land Development Authority, 220 (2015) DLT 734***, has in para 52 has held as under:

“52. On the issue raised by the respondent that there was an Arbitration Clause, therefore, the petitioner should approach the Arbitration Tribunal. It is relevant to note that as per Section 8 of the Arbitration and Conciliation Act, 1966, an application should be filed before the party files its first statement on the substance of the dispute. However, the respondent had filed its counter-affidavit on 08.08.2012 whereas the application under Section 8 of the Act was filed on 07.09.2012. Therefore, since the respondent chose to file its application after filing of its first counter-affidavit, the said application is not maintainable.”

11. Even this Court in a recent pronouncement in the case of ***Vikram Sharma v. Union of India W.P.(C) 10588/2016 decided on January 29, 2018*** has by referring to the judgment of the Supreme Court in the case of ***Booz Allen & Hamilton Inc. (supra)*** and this Court in ***S.D.Buildwell Pvt.Ltd. (supra)*** rejected the plea taken by the respondent in that case on the maintainability of the writ petition in view of the existence of an arbitration clause by holding that the respondent having filed its statement on the dispute by way of a counter affidavit to the writ petition is precluded from taking the plea that there exist an arbitration agreement. In view of the above, the plea of Ms. Biji Rajesh on the non-maintainability of the petition needs to be

rejected. Suffice to state, the issue needs to be considered on merit and I accordingly proceed to examine the same.

12. The claim of the petitioner in this petition, is for a direction to the respondent to make payment of enhanced minimum wages and the resultant increase in EPF / ESI for the period April 01, 2014 till April 01, 2017. As noted above, the initial award of the security work of the Centre to the petitioner was vide letter dated November 12, 2014 (Annexure P-4). The same was for a period of one year. The rate agreed to per person / per shift / per day was ₹474.96 for Security Guards and ₹517.22/- for Armed Security Guards and Security Supervisor respectively. The rates included the component of ESI / EPF / weekly off wages / other charges / service tax. The award of security work was accepted by the petitioner on November 12, 2014 on the terms and conditions mentioned in the said letter, which includes the following:-

“1. *Details of rate, designation and quantity of manpower.*

<i>S.No.</i>	<i>Designation</i>	<i>Number of Manpower required</i>	<i>Rate per person per shift per day</i>
<i>1.</i>	<i>Security Guard</i>	<i>393</i>	<i>474.96</i>
<i>2.</i>	<i>Armed Security Guard</i>	<i>21</i>	<i>517.22</i>

3.	Security Supervisor	13	517.22
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2. *The rates as mentioned above are inclusive of service taxes and other taxes. Nothing shall be paid above these rates. Also above rates are applicable for eight hours (standard) shift.*

3. *Scope of this work of comprehensive security arrangement Dr. SPM Civic Centre shall include but not limited to round the clock watch & ward of entire point including other / open space / basement / parking alongwith all type of furniture fixture etc. on all days including Sunday and Gazetted holidays.*

4. *The security arrangement shall be valid for one year from the date of the contract award.*

5. *Payment shall be made on the basis of actual deployment.*

6. *All the terms and conditions of the contract as mentioned in tender documents shall be applicable.*

7. *As per clause 12.14 of the contract you are requested to furnish a performance security within 15 days of receipt of office letter for an amount equal to 5% of contract for one year in the form of DD in favour of Commissioner, North Delhi Municipal Corporation.*

8. *You are requested to attend this office on 14.11.2014 to execute contract agreement on Non Judicial Stamp paper of Rs.100/-.*

9. *You are requested to deploy the security personal as mentioned as above w.e.f. 01.12.2014 morning 7:00 A.M. positively.*

If above terms and conditions are acceptable to you. You may return a signed copy of this letter as token of acceptance immediately.

13. The terms and conditions in the tender documents included the Annexure-V, which reads as under:-

“3. I/We abide by the provisions of Minimum Wages Act, Contract Labour Act and other statutory provisions like Provident Fund Act, ESI Bonus, Leave, Relieving Charges, Uniform and Allowance thereof and any other charges applicable from time to time. I/We will pay the wages to the personnel deployed as per Minimum Wages Act as amended by the Government from time to time and shall be fully responsible for any violation.”

14. It also included Clause 8.3, which reads as under:-

8.3 BID PRICES:-

8.3.1. Bidder shall quote the rates in Indian Rupees for the entire contract on a 'single responsibility' basis such that the Tender price covers contractor's all obligations mentioned in

or to be reasonably interred from the Tender document in respect of the Security Services at Dr. S.P. Mukherjee Civic Centre, J.L. Nehru Marg, New Delhi-110002. This includes all the liabilities of the contractor such as cost of uniform and identify cards of personnel deployed by the contractor and all other statutory liabilities like Minimum Wages, ESI PF contributions, service charges all kinds of taxes etc. which should be clearly stated by the contractor.

8.3.2. The rates and quoted shall be responsive and the same should be inclusive of all Statutory obligation such as Minimum Wages, ESI PF contributions, wages for leave reserve, service charges, all kinds of taxes etc. The offers of those prospective bidders which do not meet the statutory requirements are liable to be rejected.

8.3.3 The rates and quoted shall be responsive and the same should be inclusive of all Statutory obligation such as Minimum Wages, ESI, PF contributions, wages for leave reserve, service charges, all kinds of taxes etc. The offers of those prospective bidders which do not meet the statutory requirements are liable to be rejected.

15. The Note-1 at page 49 of the paper book also reads as under:-

“1. The Security Guard will be considered under the Semi-Skilled category. Contractor shall provide uniformed and trained personnel and use its best endeavour to provide Security services to the entire Civic Centre, its moveable as well as immoveable properties, staff for providing safety,

monitoring and surveillance. Rates quoted will include all statutory obligations of the contractor under minimum Wages Act, Contract Labour (R&A) Act, weekly-off replacement charges, cost of uniform of personnel deployed by the contractor, all kinds of taxes, service charges, etc. If the agency. The rate quoted will be for per shift of eight hours per person per day. If the minimum wages is revised by the Government of NCT of Delhi / Government of India, the incremental wages, if applicable, will be provided.”

16. Pursuant to the award of work vide letter dated November 12, 2014, the parties herein had on November 25, 2014 executed a contract agreement of which clause 5 stipulated as under:-

“5. The rate quoted are for per shift of eight hour per person per day. If the minimum wages are revised by the government of NCT of Delhi / Government of India, the incremental wages will be provided.”

17. But at the same time, the terms and conditions of the contract also included the following:-

“2. The contractor shall abide by and comply with all the relevant laws and statutory requirements covered under Labour Act, Minimum Wages and (Contract Labour (Regulation & Abolition Act 1970), EPF etc. With regard to the Security personnel engaged by him for works. It will be the responsibility of the contractor to provide details of manpower deployed by him, in the Department as well as to

the Labour Department of North Delhi Municipal Corporation.”

18. What is important in this case is that, much before the security work was awarded to the petitioner vide letter dated November 12, 2014 and also before the contract agreement dated November 25, 2014 was executed on August 28, 2014, the Department of Provident Fund increased the cap on which the Provident Fund shall be paid from ₹6,500/- to ₹15,000/- with effect from September 01, 2014 and varied the rate from 13.61% to 13.36%. In other words, on the date when the work was awarded to the petitioner and the contract agreement was executed between the parties, the EPF, capping already stood enhanced. The petitioner did not sought variance in the terms and conditions of the contract on the basis of the notification dated August 28, 2014 of the Department of the Provident Fund increasing the cap. For all purposes, the petitioner agreed for the rate of ₹474.96/- for Security Guards and ₹517.22/- for Armed Security Guards and Security Supervisor respectively as the rate per person / per shift / per day. It may be stated here, on that date i.e November 12, 2014, the minimum wages payable to a Security Guard was ₹367/- per day and for Armed Security Guard / Security Supervisor it was ₹403/- respectively, which were much below the rates agreed to by the respondent Corporation, to be payable to the petitioner. It appears, for this reason no objection was raised by the petitioner till April 25,

2015 when for the first time the petitioner sought payment of enhanced minimum incremental wages. Suffice to state, this request of the petitioner for enhancement of incremental wages was contrary to the rates already accepted by the petitioner, vide its letter dated November 12, 2014, which rates were quoted by the petitioner itself, which were accepted by the respondent resulting in the award of work to the petitioner.

19. Even though, Mr. Gogna may be right in contending that the minimum wages have undergone increase from time to time i.e to ₹385/- for Security Guards and ₹423/- for Armed Security Guards and Security Supervisor respectively with effect from April 01, 2015 and ₹390/- for Security Guards and ₹429/- for Armed Security Guards and Security Supervisor respectively with effect from October 01, 2015, still the minimum wage payable in terms of the notification issued by the Appropriate Government was below the quoted rate of ₹474.96/- for Security Guards and ₹517.22/- for Armed Security Guards and Security Supervisor respectively. Not only this, even after the expiry of the contract dated November 25, 2015, the petitioner had, without any demur accepted the extension of the contract for the period December 01, 2015 to November 30, 2016 vide letter dated September 14, 2016 on the same terms and conditions i.e rates payable per shift / per day as ₹474.96/- for Security Guards and ₹517.22/- for Armed Security Guards and

Security Supervisor respectively. No doubt the petitioner had written letters to the respondent, but the same were in the first year of the Contract or after April 01, 2017. Appropriate for the petitioner should have been to decline the extension granted by the respondent. Even as on December 01, 2015, the rates of the minimum wage were ₹390/- for Security Guards and ₹429/- for Armed Security Guards and Security Supervisor respectively, which were also much below the rate agreed to by the respondent i.e ₹474.96/- for Security Guards and ₹517.22/- for Armed Security Guards and Security Supervisor respectively. So, it is not a case of non-payment of minimum wages as prescribed by the Appropriate Government. Rather, it is a case where enhancement is sought in the rate / per shift / per day because of revised minimum wages and higher capping for computing PF. Such enhancement would be contrary to what has been agreed to by the petitioner, as noted above. No doubt, there is a stipulation in the contract that in the eventuality, the minimum wages are revised by the Government of NCT of Delhi / Government of India, the incremental wages, if applicable will be provided. The question would be, who would provide the incremental wages, i.e. the petitioner or the respondent. A reading of the various stipulations noted above, it must be held that it is the obligation of the petitioner to grant the incremental wages, if applicable. The issue can be seen from a different

perspective, inasmuch if the petitioner was not satisfied with the terms and conditions at the time of extension of contract, the petitioner should have withdrawn itself from the contract for extended period effective from December 01, 2015. Having not withdrawn itself from the extended contract, but agreed to the terms, the petitioner cannot now seek a better rate on the pretext that the minimum wages have been increased or there is an increase in capping for calculating the PF. Not only this, I find the petitioner had accepted without any demur, further extension w.e.f. October 01, 2016, on the same terms and conditions despite the minimum wages having been increased to ₹407/- for Security Guards and ₹447/- for Armed Security Guards and Security Supervisor respectively with effect from March 01, 2016 and ₹414/- for Security Guards and ₹455/- for Armed Security Guards and Security Supervisor respectively, which are still under ₹474.96/- for Security Guards and ₹517.22/- for Armed Security Guards and Security Supervisor respectively. It is not a case where the minimum wages prescribed by the Appropriate Government are being denied by the respondent. Even if denied, the same is for the petitioner to pay.

20. So, it follows despite knowing the increase in the minimum wages and increase in the capping of PF, the petitioner had accepted at least by conduct, the terms and conditions for three successive years. In fact, the petitioner has

not even cared to challenge the orders whereby the contract was extended from time to time on the same terms and conditions in these proceedings. The petitioner is precluded from seeking the relief of payment of enhancement of the rate / per shift / per day under the garb that the minimum wages / capping for calculating PF have been increased. In this regard, I may refer to the judgments of the Supreme Court and this Court. In ***Alopi Parshad & Sons vs. Union of India, (1960) 2 SCR 793***, the Supreme Court held that the contract is not discharged merely because it turns out to be a difficult to perform or onerous. In that case the agent, appointed by the Government for supply of ghee, claimed enhancement of rates on the ground that the circumstances changed due to the war. The Supreme Court rejected the claim and held as under:

“21. ...Performance of the contract had not become impossible or unlawful; the contract was in fact, performed by the Agents, and they have received remuneration expressly stipulated to be paid therein. The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executor contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like.

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22. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the

contract, merely because on account of an unanticipated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr. Chatterjee, relying upon which a party may ignore the express covenants on account of an unanticipated turn of events since the date of the contract...”

(Emphasis Supplied)

21. In ***Panna Lal vs. State of Rajasthan, (1975) 2 SCC 633***, the Supreme Court held that a party cannot resile from the contract on the ground that the terms of payment were onerous. The relevant portion of the judgment is as under:

“21. The licences in the present case are contracts between the parties. The Licensees voluntarily accepted the contracts. They fully exploited to their advantage the contracts to the exclusion of others. The High Court rightly said that it was not open to the appellants to resile from the contracts on the ground that the terms of payment were onerous. The reasons given by the High Court were that the Licensees accepted the licence by excluding their competitors and it would not be open to the Licensees to challenge the terms either on the ground of inconvenient consequence of terms or of harshness of terms.”

(Emphasis supplied)

22. In ***State of Haryana vs. Jage Ram (1980) 3 SCC 599*** the Supreme Court held that the Licensee cannot challenge the terms of the licence on the ground that he is finding it commercially inexpedient to conduct his business. The Supreme Court reaffirmed the principles laid down in ***Har Shankar v.***

Deputy Excise and Taxation Commissioner (1975) 1 SCC 737. Relevant

portion of the said judgement is reproduced hereunder:

“14. In Har Shankar [(1975) 1 SCC 737, 745-46] appellants' bid was accepted in an auction held on March 23, 1968 for the right to sell country liquor at two vends in Ludhiana. The appellants paid the security deposit but were unable to meet their obligation under the conditions of auction and fell in arrears. When the State demanded the payment, threatened to cancel the licences granted to the appellants and declared its intention to resale the vends, the appellants filed writ petitions in the High Court of Punjab and Haryana asking that the auction be quashed and the respondents be restrained from enforcing the obligations arising under its terms and conditions. The High Court having dismissed the writ petitions, the Licensees filed an appeal to this Court by certificate.

15. What is important for our purpose in this appeal is that the State of Punjab, which was respondent to the appeal in Har Shankar [(1975) 1 SCC 737, 745-46] raised a preliminary objection to the maintainability of the writ petitions filed by the appellants and that objection was upheld by this Court. The preliminary objection was that such of the appellants who offered their bids in the auctions did so with a full knowledge of the terms and conditions attaching to the auctions and that they could not be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids. Holding that the preliminary objection was well-founded, this Court observed: (SCC pp. 745-746, para 16)

“Those interested in running the country liquor vends offered their bids voluntarily in the auction held for granting licences for the sale of country liquor. The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot

by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force.” (p. 263)

At p. 266 (SCC p. 748) of the Report, the court further observed that the writ jurisdiction of High Courts under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred.

16.....They entered into a contract with the State authorities with the full knowledge of conditions which they had to carry out in the conduct of their business, on which they had willingly and voluntarily embarked. The occurrence of a commercial difficulty, inconvenience or hardship in the performance of those conditions, like the sale of liquor being less in summer than in winter, can provide no justification for not complying with the terms of the contract which they had accepted with open eyes.

17. The judgment in Har Shankar [(1975) 1 SCC 737, 745-46] was followed in Sham Lal v. State of Punjab [(1977) 1 SCC 336] wherein, appellants were the highest bidders in an auction for the sale of country liquor vends at various places in the State of Punjab. The appellants were called upon by the State to pay the amounts which they were liable to pay under the terms of the auction, whereupon they filed writ petitions in the High Court to challenge the demand. Relying upon the passage from Har Shankar [(1975) 1 SCC 737, 745-46] extracted above, the court held that the Licensees could not be permitted to avoid the contractual obligations voluntarily incurred by them and that therefore the High Court was right in refusing to exercise its jurisdiction under Article 226 of the Constitution in their favour.

18. In view of these decisions, the preliminary objection raised by the Solicitor General to the maintainability of the writ petitions filed by the respondents has to be upheld. We hold accordingly that the High Court was in error in entertaining

the writ petitions for the purpose of examining whether the respondents could avoid their contractual liability by challenging the Rules under which the bids offered by them were accepted and under which they became entitled to conduct their business. It cannot ever be that a Licensee can work out the licence if he finds it profitable to do so; and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.”
(Emphasis supplied)

23. In ***New Bihar Biri Leaves Co. vs. State of Bihar (1981) 1 SCC 537***, the Supreme Court held that it is a fundamental principle of general application that if a person of his own accord, accepts or contracts on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The relevant portion of the judgment is reproduced as under:

“48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobat (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction.

49. The aforesaid inhibitory principle squarely applies to the cases of those petitioners who had by offering highest bids at public auctions or by tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned Condition (13) on the ground that this condition is violative of Articles 19(1)(g) and 14 of the Constitution.”

(Emphasis supplied)

24. In *Assistant Excise Commissioner vs. Issac Peter (1994) 4 SCC 104*, the Supreme Court held that in cases of contracts entered into with open eyes, a party cannot seek alteration of the terms expressly agreed to, on the ground of financial hardship. The State has no responsibility to ensure profit to everyone who contracts with it. The relevant portion of the judgment is reproduced hereunder:

“14.....The contract between the parties is governed by statutory provisions, i.e., provisions of the Act, the Rules, the conditions of licence and the counterpart agreement, they constitute the terms and conditions of the contract. They are binding both upon the Government and the Licensee. Neither of them can depart from them. It is not open to any officer of the Government to either modify, amend or alter the said terms and conditions, not even to the Minister for Excise.

21.....It is not a case where any essential term of contract was kept back or kept undisclosed. The Government had placed all their cards on the table. If the Licensees offered their bids with their eyes open in the above circumstances they cannot blame anyone else for the loss, if any, sustained by them, nor are they entitled to say that license fee should be reduced proportionate to the actual supplies made.

23. Maybe these are cases where the Licensees took a calculated risk. Maybe they were not wise in offering their bids. But in law

there is no basis upon which they can be relieved of the obligations undertaken by them under the contract. It is well known that in such contracts -- which may be called executory contracts -- there is always an element of risk. Many an unexpected development may occur which may either cause loss to the contractor or result in large profit. Take the very case of arrack contractors. In one year, there may be abundance of supplies accompanied by good crops induced by favourable weather conditions; the contractor will make substantial profits during the year. In another year, the conditions may be unfavourable and supplies scarce. He may incur loss. Such contracts do not imply a warranty -- or a guarantee -- of profit to the contractor. It is a business for him -- profit and loss being normal incidents of a business. There is no room for invoking the doctrine of unjust enrichment in such a situation. The said doctrine has never been invoked in such business transactions. The remedy provided by Article 226, or for that matter, suits, cannot be resorted to wriggle out of the contractual obligations entered into by the Licensees.

26. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the Licensees in such contracts. There is no warranty against incurring losses. It is a business for the Licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the Licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between

the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases.”

(Emphasis supplied)

25. In ***Puravankara Projects Ltd. vs. Hotel Venus International***, (2007)

10 SCC 33, the Supreme Court held that the tender terms are contractual and it is the privilege of the Government which invites its tenders and the Courts do not have jurisdiction to judge as to how the tender terms would have to be framed.

26. In ***Bharti Cellular Limited v. Union of India*** (2010) **10 SCC 174**, the

Supreme Court held that no one can approbate and reprobate the same document and anyone who has accepted with full knowledge or notice of facts, benefits under a transaction which he might have rejected or contested, cannot question the transaction or take up an inconsistent position qua the same. Party who has unconditionally accepted the package cannot thereafter reject the inconvenient and onerous conditions while accepting the conditions beneficial to him. Relevant portion of the said judgment is reproduced hereunder:-

“8. ...A party which has unconditionally accepted the package cannot after such acceptance reject the conditions subject to which the benefits were extended to it under the package. It cannot reject what is inconvenient and onerous while accepting what is beneficial to its interests...”

9. *Relying upon the decision of this Court in City Montessori School v. State of U.P, New Bihar Biri Leaves Co. v. State of Bihar and R.N. Gosain v. YashpalDhir, this Court has in ShyamTelelink Ltd. v. Union of India held that no one can approbate and reprobate and anyone who has accepted with full knowledge or notice of facts, benefits under a transaction which he might have rejected or contested, cannot question the transaction or take up an inconsistent position qua the same. We have said: (ShyamTelelink case, SCC p. 172, para 23)*

‘23. The maxim qui approbat non reprobatur (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.’

(Emphasis added)

27. In ***Track Innovations India Pvt. Ltd. vs. Union Of India, 2010 (170)***

DLT 424, the Division Bench of this Court held that there cannot be variation of the terms of a commercial contract, which has been acted upon. Government is not bound to ensure profit in every commercial contract more so when the contract had been awarded either by public auction or by floating tender or negotiations. The Division Bench further noted that a person cannot approbate and reprobate or accept or reject the same instrument. Relevant portion of the said judgment is reproduced hereunder: -

“12. ...we are of the opinion that in commercial contracts, such as the present, where the private contractors enter into these

contracts having huge financial stakes, there is no scope for seeking variation of the terms of the contract which have been acted upon on the ground of alleged unreasonableness by invoking Article 14 of the Constitution.”

“14. The portions of the above judgments, underlined by us clearly show that in commercial contracts entered into with open eyes, there cannot be variation to the terms of the concluded contract which has been acted upon. Commercial men take commercial decision which sometimes results either in profit or sometimes in loss, however, the Government is not bound to ensure profit in every contracts which are either by public auction or by floating tenders or negotiations. It has been clarified that there is no issue of fairness or arbitrariness with respect to terms of the contract in such commercial contracts.”

28. I am conscious of the fact that this Court in a petition filed by the petitioner challenging the action of the tender evaluation committee not considering the service charges and the lower rates towards PF contribution at the time of awarding the tender as unjustified. The Court held that the liability to pay statutory dues is absolute, including the revised minimum wages and the PF benefits. The challenge in the said judgment was to the process of evaluation by the tender committee for shortlisting a party and awarding the Contract, which was set aside. The claim of the petitioner in this petition is for the period post the award of the Contract which clearly stipulates the rates payable to the petitioner. The judgment is clearly distinguishable. Insofar as the other judgments referred to by Mr. Gogna are concerned, those are on the proposition; (i) duty of Court to ensure social and

economic justice to the weaker sections; (ii) concept of model employer and role of State as a model employer; (iii) Court should guard the fundamental rights of the citizens while exercising writ of mandamus; (iv) right of fair wages is an integral part of right to life; (v) the Court should interfere when the State is committing error of law or is abusing its powers, which have no applicability in view of my conclusion above.

29. In view of my above discussion, I do not find any merit in the petition, the same is dismissed.

CM. No. 33688/2017 (for interim relief)

Dismissed as infructuous.

OCTOBER 23, 2018/jg/aky

V. KAMESWAR RAO, J