East Delhi Municipal Corporation vs.pawan Kumar Suri

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Court : Delhi

Decided On : Mar-22-2018

Appellant : East Delhi Municipal Corporation

Respondent : Pawan Kumar Suri

Judgement :

$~ * + IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

23. d February, 2018 Date of decision:

22. d March, 2018 RFA10092017 & CM APPL. 47233/2017 (Stay) EAST DELHI MUNICIPAL CORPORATION ..... Appellant Through: Mr. Mini Pushkarna, Standing Ms.Anushruti, with Counsel Advocate. (9810674872) Through: Ms. Monisha, Advocate. ..... Respondent versus PAWAN KUMAR SURI CORAM: JUSTICE PRATHIBA M. SINGH Prathiba M. Singh, J.

JUDGMENT1 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, Nr DMC) and East Delhi Municipal Corporation (hereinafter, EDMC), on the other. Nr DMC 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 respect of each of the work orders, the Contractors seek either/all RFA10092017 Page 1 of 58 of the following payments: a. Payment of the principal amount as passed in the final bill; b. c. Refund of security deposit; 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. The questions that have arisen in all these cases 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?.

5. Arguments have been addressed by Mr. Sunil Goel and Ms. Mini Pushkarna on behalf of the Corporations - Nr DMC and EDMC, respectively. On behalf of the Contractors in some matters, Mr. Vinay Kumar has made submissions. RFA10092017 Page 2 of 58 Background of the case 6. In the present case, the Contractor was awarded three work orders being 190 dated 3rd December, 2012, No.191 dated 3rd December, 2012, and No.272 dated 13th February, 2013. The final bills in respect of each of the work orders were passed on 22nd January, 2014 but no payment was made. Security deposits were also made by the Contractor. Notice was issued on 10th February, 2015 and upon not receiving payment, the Contractor filed a suit for recovery of Rs.19,94,421/- which included

principal amount of Rs.16,72,963/-, security refund of Rs.1,69,458/-, and interest of Rs.1,52,000/-.

7. In the written statement, the Corporation contended as under: 5 to 8 It is wrong to allege that the plaintiff has not informed about the procedure for making of the payment. It is submitted that the plaintiff is well aware about the mode/procedure of making the payment. It is further wrong to allege that the amount, which is legally recoverable, has been with hold by the answering defendants. It is further wrong to allege that the plaintiff is entitled to get the interest @ of Rs. 12%. It is submitted that the detailed of the payment which is payable to the plaintiff is as under:-

"Description WO No.190 dated 03.12.12 WO No.191 dated 03.12.12 664587/- 641185/- Gross Amount of the executed work (A) Mandatory/ Statutory Deductions 10% 47558/- 48877/- WO No.272 dated 13.02.13 661107/- 47785/- RFA10092017 Page 3 of 58 (after deductions of earnest money of Rs. 11900/-) 12823/- (after deductions of earnest money of Rs. 12250/-) 13296/- (after deductions of earnest money of Rs. 11950/) 13222/- 25646/- 6411/- 26583/- 6645/- 26444/- 6611/- - - - - - - 3963/- 96401/- 4033/- 99449/- 3987/- 98049/- 544784/- 565138/- 563058/- Security 2% Income Tax VAT1 Labour Cess Edu Cess Water charges Penalty Total Deductions (B) Net payable amount (A- B) It is submitted that the plaintiff is entitled only of (544784 + 565138 + 563058/-) 16,72,980/- and for the same demand already has been sent to the HQ for releasing the fund. It is also pertinent to mention that with hold security of Rs. 1,44,220/- as well as earnest money of 36,100/- as mentioned in the above table will be released after making the final payment of Rs. 16,72,980/- as and when the plaintiff apply for the same. 8. The Corporation also did not dispute that the final bills were in fact passed. The Contractor then moved an application under Order XII Rule 6 of the CPC. In view of the fact that the bills were passed, the Trial Court decreed the suit on 26th September, 2016, on the basis of admissions made, in the following terms: RFA10092017 Page 4 of 58 26. The defendants have admitted the claim of the plaintiff in all respects and the payment of work orders No.190,191 and 272 was payable within six months from the date of passing of the bill. ..... 29. In view of the Clause 45 of the General Rules and Directions, the plaintiff is also entitled for

total security amount of Rs.1,69,458/- subject to clearance certificate as per rules from the Labour Officer. In view of the foregoing discussion, the 30. application under Order12 Rule 6 CPC is allowed granting following relief to the plaintiff:-

"The suit of the plaintiff is decreed:-

"a) for a sum of Rs.18,42,421/- with interest @12% per annum from the date of filing of the petition till the realization of the decretal amount. The suit, accordingly, stands decreed with costs. Decree sheet be prepared accordingly. File be consigned to record room. 9. The Trial Court has thus passed a consolidated decree for the entire Principal and the security amount. The Corporation, aggrieved with the aforementioned judgment, filed the present appeal.

10. 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 RFA7862016 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. parties, the following order was passed : On 17.11.2016, with the consent of the RFA10092017 Page 5 of 58 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 RFA10092017 Page 6 of 58 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. amounts (vii) It is further agreed that the appellants will not be liable to pay interest on the principal 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. payable to (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 the appellants @ 9% per annum on 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 RFA10092017 Page 7 of 58 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. 11. The said order further records in paragraph Nos.14 to17 as under: The

said offer is however unacceptable to the 14. 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 RFA10092017 Page 8 of 58 for the respondents counsel appearing in RFA7012016, RFA No.707/2016, RFA7882016, RFA7892016, RFA7912016 submits, on instructions from his clients, that they are ready and willing to settle the entire dispute with the appellant/Nr DMC 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. Accordingly, the entire dispute, subject matter 17. 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/Nr DMC 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/Nr DMC and the respondents in the appeals mentioned 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. in para 16 above, 12. Order No.1 dated 1st December, 2016 was passed in lead matter RFA7862106 and RFA1922016 involving Nr DMC and EDMC. By this order, the Learned Single Judge of this Court disposed of a bunch of Nr DMC and EDMC appeals based on a consensus arrived at between the parties. The Court refers to

an earlier order dated 17th November, 2016 and disposes of RFA10092017 Page 9 of 58 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 RFA10092017 Page 10 of 58 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.

13. Thus, 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. Nr DMC 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 RFA10092017 Page 11 of 58 September, 2017 which relied on an order of this Court dated 25th September, 2017 passed in RFA8182017, 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 RFA8472017 and RFA8492017 - 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.

14. A summary of all the above mentioned 4 orders shows that each of RFA10092017 Page 12 of 58 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) b) It was an order passed in appeals by consent of parties; The order dealt with payments of Principal amounts and interest thereon 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 terms for 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.

15. 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. In addition, the Contractors in the present appeals have refused to abide by the terms of Order No.1 as the said order was a consent order. Proceedings before the Supreme Court.

16. 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: RFA10092017 Page 13 of 58 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 accordingly. List the matter in the first week of December, 2017. is directed to act 17. 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. 18. 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 RFA10092017 Page 14 of 58 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.

19. 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.

20. 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. RFA10092017 Page 15 of 58 21. It is settled as far back as in 1989, when the Supreme Court in Municipal Corporation of Delhi v. Gurnam Kaur (1989) 1 SCC101held 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 judges 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) DRJ518 22. 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 RFA10092017 Page 16 of 58 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 23. 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?. RFA10092017 Page 17 of 58 Question No.1- Payment of Principal amount 24. 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 25. 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: CLAUSE7Payment 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 RFA10092017 Page 18 of 58 done together with the the requisite progress 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 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 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 RFA10092017 Page 19 of 58 to the in accordance with interest shall be payable accounts. No 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 final certificate and shall not by itself be conclusive evidence that any work or materials to which it relates is/are the contract and specifications. Any such interim payment or any part thereof shall not it 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 RFA10092017 Page 20 of 58 furnished by 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 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 26. In addition, the Corporation also relies on the amendment to the General Conditions of Contract dated 19th May, 2006 which reads as under: RFA10092017 Page 21 of 58 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. 27. 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 RFA10092017 Page 22 of 58 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 if 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. Chief Engineer (Plg.) Sd/- 28. 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) d) The payment of bills shall be strictly made on queue basis; No interest shall be payable in case of delay in payment, on account of non-availability of funds.

29. 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 RFA10092017 Page 23 of 58 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 30. 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.

31. 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.

32. 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 RFA10092017 Page 24 of 58 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: that the contract uses A careful reading of 7. 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 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 RFA10092017 Page 25 of 58 in the leave taken the stand facie, 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.. 33. The clause which the Court dealt with in the said case reads as under: furnished by "CLAUSE9Payment 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 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) (ii) If the Tendered value of work is upto Rs. 5 lakhs :

3. months If the Tendered value of work exceeds Rs. 5 lakhs :

6. months "

34. 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 RFA10092017 Page 26 of 58 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; RFA10092017 Page 27 of 58 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.

35. 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.

36. 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.

37. 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 SCC156 the Supreme Court held: RFA10092017 Page 28 of 58 from ....The principle deducible the above 89. 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 its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and the State through RFA10092017 Page 29 of 58 that reasonable apprehension 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 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 RFA10092017 Page 30 of 58 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 transactions and changed to new it RFA10092017 Page 31 of 58 years J., earlier, Burrough, 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 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 RFA10092017 Page 32 of 58 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. 38. 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. 39. 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 RFA10092017 Page 33 of 58 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'.

40. In Indian Oil Corporation Limited v. Nilofer Siddiqui & Ors. (2015) 16 SCC125(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 In Nilofer Siddiqui (supra), the Court found that the distributorship 41. 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 RFA10092017 Page 34 of 58 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.

42. 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.

43. 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.

44. Mrs. I.K. Sohan Singh v. State Bank of India AIR1964P&H123 involved a transaction of a sale deed wherein the balance sale consideration RFA10092017 Page 35 of 58 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 RFA10092017 Page 36 of 58 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. 45. A similar view is echoed in Hungerford Investment Trust Ltd. v. Haridas Mundhra and others AIR 1972 SC1826wherein 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. RFA10092017 Page 37 of 58 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 to perform his promise without promissory is application by the promisee and no 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 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. the decree, time that it 46. Learned counsel for the Corporation has relied upon Bank of India v. K. Mohandas (2009) 5 SCC313and Super Poly Fabriks Ltd. v. Commissioner of

Central Excise, Punjab (2008) 11 SCC398to 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. RFA10092017 Page 38 of 58 47. The learned counsel for the Corporation also relies upon Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Co. Ltd. (2011) 10 SCC420(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.

48. 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 Contractors 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 RFA10092017 Page 39 of 58 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.

49. The counsel for the Corporation also relies upon New Bihari Biri Leaves Co. v. State of Bihar (1981) 1 SCC537to 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. RFA10092017 Page 40 of 58 50. On the word `reasonable' the Corporation relies on Veerayee Ammal Vs. Seeni Ammal AIR 2001 SC2920 Even in the said judgment the Supreme Court holds: in to regard reasonable

"13. The word "reasonable" has in law prima facie meaning of 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 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: its conclusion according in time, reasonable looking at all "A 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.

51. 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 RFA10092017 Page 41 of 58 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. Question No.2 - Refund of Security deposit 52. In respect of each work order, the Contractors have to deposit 10% as the security deposit at the initial stage. Upon the payment of the final bill and after issuance of labour clearance certificate, the security deposit is liable to be refunded. The Contractors have, in some of the appeals included the security deposit amount in the principal amount claimed and in some other cases the refund of security deposit has been sought for separately. In either case, there is no doubt that the security deposit is liable to be refunded after the submission of the documents, certificates from the Labour Officer. Clause 17 and Clause 45 relating to refund of security deposit reads as under: CLAUSE17Contractor maintenance period : liable for damages, defects during RFA10092017 Page 42 of 58 If the contractor or his working people or servants shall break, deface, injure or destroy any part of building in which they may be working, or any building, road, road kerb, fence, enclosure, water pipe,

cables, drains, electric or telephone post or wires, trees, grass or grassland, or cultivated ground contiguous to the premises on which the work or any part is being executed, or if any damage shall happen to the work while in progress, from any cause whatever or if any defect, shrinkage or other faults appears in the work within twelve months (six months in the case of work costing Rs.5.00 lacs and below except road work) after a certificate final or otherwise of its completion shall have been given by the Engineer-in- Charge as aforesaid arising out of defect or improper materials or workmanship the contract shall upon receipt of a notice in writing on that behalf make the same good at his own expense or in default the Engineer-in-Charge cause the same to be made good by other workmen and deduct the expense from any sums that may be due or at any time thereafter may become due to the contractor, or from his security deposit or the proceeds of sale thereof or of a sufficient portion thereof. The security deposit of the contractor shall not be refunded before the expiry of twelve months (six months in the case of work costing Rs.5.00 lacs except dense carpet works) after the issue of the certificate final or otherwise, of completion of work or till the final bill has been prepared and passed whichever is later. In case of dense carpet works the Security Deposit of the contractor shall not be refunded before the expiry of 5 & 7 years of maintenance from last day of the month in which a particular road is completed in case of binder of penetration
grade & CRMB60binders respectively. RFA10092017 Page 43 of 58 CLAUSE45Release of Security deposit after labour clearance : Security Deposit of the work shall not be refunded till the contractor produces a clearance certificate from the Labour Officer. As soon as the work is virtually complete the contractor shall apply for the clearance certificate to the Labour Officer under intimate on to the Engineer-in-Charge. The Engineer- in-Charge on receipt of the said communication, shall write to the Labour Officer to intimate if any complaint is pending against the contractor in respect of the work. If complaint is pending on record till after 3 months after completion of the work and/or no communication is received from the Labour Officer to this effect till six months after the date of completion it will be deemed to have received the clearance certificate and the security Deposit will be released if otherwise due. 53. Clauses 17 and 45 relating to security deposits have also been interpreted in the Circular dated 10th June

2014, as under: Clause 17:-

"The security deposit shall not be refunded before expiry of one year from the date of completion of work. Clause 45:-

"Security deposit shall not be refunded till the contractor produces clearance certificate from the Labour Officer.

54. A perusal of all the aforementioned Clauses reveals that: a) For refund of security deposit, a clearance certificate is needed from the Labour Officer; b) Once the work is completed, the Contractor would apply for the clearance certificate under intimation to the Engineer-in-Charge; RFA10092017 Page 44 of 58 c) The Engineer-in-Charge has to communicate to the Labour Officer if there is any complaint in respect of the work executed; d) If after completion of the work, 3 months have elapsed and no communication is received, after date of completion, there is a deemed clearance certificate and the security deposit is liable to be released.

55. Thus, irrespective of the date of payment of the principal amount, the security deposit cannot be held back beyond a period of 6 months from the date when application is made to the Labour Officer for issuance of the clearance certificate. These Clauses do not brook any delay in so far as the refund of the security deposit is concerned. Moreover, there is no clarity whatsoever as to how the refund of Security deposit is subject to the queue system and availability of funds. The Clause itself does not contemplate any such condition. Thus, the security deposit is liable to be refunded upon the compliance of the conditions in Clauses 17 and 45 of the General Conditions of Contract. The Supreme Court also directed immediate payment of Security deposit in its order dated 5th January 2018. Order XII Rule 6 56. 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

RFA10092017 Page 45 of 58 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.

57. 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.

58. As per Himani Alloys Ltd. v. Tata Steel Ltd. (2011) 15 SCC273cited 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. Question No.3- Whether Interest is payable?.

59. The question that now arises is as to whether interest is payable on the principal amount and the delay in refund of security deposit. This question has been considered by two Single Judges of this Court in cases involving almost identical clauses in R.K. Pabbi v. DDA [CS(OS) No.1368/2012 dated 9th January, 2014]. and Varinder Jeet Singh v. Municipal Corporation of Delhi & Anr. 2013 (134) DRJ284(hereinafter, Varinder Jeet Singh), which in turn relied upon the decision of a Single Judge of this RFA10092017 Page 46 of 58 Court in Jagbir Singh (supra).The judgement in Varinder Jeet Singh (supra), after discussing the law on the subject held: 15. It is settled law that if a person is deprived of the use of money to which he is legitimately entitled, he has a right to be monetarily compensated for the said deprivation. [Ref: (1992) 1 SCC508 Secretary, Irrigation Deptt. Govt. of Orissa vs. G.C. Roy; (2004) 5 SCC65 Ghaziabad Development Authority vs. Balbir Singh, and (2009) 8 SCC507 Sri Venkateswara Syndicate vs.

Oriental Insurance Company Ltd. and Anr.].. The object behind awarding interest to a party, who has suffered loss, due to a legitimate deprivation of the enjoyment of the use of money that he was entitled to rightfully, is to balance the equities and while doing so, the facts involved in each case must be examined by the Court.

16. The statutory provisions with regard to payment of interest are laid down in Section 3 of the Interest Act, 1978, that provides that in any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, if the proceedings do not relate to a debt payable by virtue of a written instrument at a certain time, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable, then interest will be claimed, till the date of institution of the proceedings.

17. In the present case, admittedly, the plaintiff had issued a notice dated 09.04.2009, calling upon the defendants/MCD to clear the outstanding dues with interest payable @ 24% per annum. In view of the RFA10092017 Page 47 of 58 provisions contained in Section 3 of the Interest Act, 1978, the plaintiff is entitled to claim interest from the date, the principal amount was due and payable to him by the defendants/MCD... 60. In almost similar circumstances, a Contractor had filed a suit under Order XXXVII of the CPC against the MCD claiming interest on delayed payments. In NDMC v. Prem Chand Gupta [RFA Nos. 623/2017 and 628/2017 dated 17th July, 2017]. (hereinafter, Prem Chand Gupta) a Single Judge of this Court held that under Clause 9 of the General Conditions of Contract, interest is liable to be paid. The relevant portion is extracted herein below: (supra), it 5. In view of the ratio laid down in the case of M/s the N.K. Garg Co. appellant/defendant cannot claim on the basis of Clause 9, that it is not liable to pay interest. The court below has thus rightly decreed the suit for the rate of interest at 8/9% per annum. is held that 61. This judgment has relied upon another judgment of a Single Judge of this Court in Union of India v. N.K. Garg 2015 (224) DLT668(hereinafter, N.K. Garg) wherein the Court had held that non-payment of

interest would be contrary to the provisions of the Interest Act, 1978. The Corporation argues that the judgment in N.K. Garg (supra) has been stayed by a Division Bench of this Court in FAO(OS) No.73/2016 vide order dated 9th March, 2016. However, the judgment in Prem Chand Gupta (supra) has not been reversed or set aside. In fact, the order in Prem Chand Gupta (supra) has also been reiterated subsequently on 14th September, 2017, when the Corporation had sought recall of the order dated 17thJuly, 2017 on the ground that the judgment in N.K. Garg (supra) had been stayed. While RFA10092017 Page 48 of 58 dealing with the judgment in N.K. Garg (supra), the Single Judge of this Court reiterated the order dated 17th July, 2017 in the following terms:

2. The applications for recall of the judgment dated 17.7.2017 are misconceived. Whenever a judgment is appealed from and operation of the judgment is stayed, it is the operative part of the judgment which is stayed and not the legal position on the basis of which the case is decided. This is because a judgment is judgment between two private parties and is a judgment in personam and not a judgment in rem. The judgment of this Court dated 17.7.2017 relying upon Union of India Vs. M/s N.K. Garg & Co. 2015 (224) DLT668is therefore not wrong as argued by the appellant and simply because the judgment in the case of M/s N.K. Garg & Co. (supra) has been challenged before a Division Bench of this Court and the Division Bench has stayed operation of the judgment in the case of M/s N.K. Garg & Co. (supra).

3. If the contention of the applicant/appellant is accepted as correct, then, the same would result in the fact that if a case is decided on a particular legal position, and the judgment in that case is subject matter of appeal and operation of which is stayed, then, no further case can at all be decided in terms of the legal proposition laid down in the judgment which is appealed.

4. Another argument which is urged before this Court is that other coordinate benches of this Court have held that in view of clause that interest is not payable, hence, interest could not be paid, however, the argument is misconceived because the judgment in the case of M/s N.K. Garg & Co. (supra) proceeds on the basis that such a clause denying interest is itself hit by Section 23 of the Contract

Act, 1872 and hence such a clause denying interest is void and therefore cannot be RFA10092017 Page 49 of 58 relied upon. 62. On this aspect, the Corporation unabashedly relies on the amendment dated 19th May, 2006. In effect, therefore, the Corporation says that it would not pay any interest in case of delayed payments as per the amended conditions of contract. Thus, even if a Contractor is willing to wait, for God knows how long, he would not be entitled to any interest.

63. The provisions of Section 3 of The Interest Act, 1978 and Section 34 of the CPC clearly recognize that the Court may allow interest to the person entitled to the debt or damages. The question is whether interest would be awardable even if the contract prohibits the same. The question of award of interest in commercial contracts has been discussed by the Supreme Court in Union of India Vs. M/s. Bright Power Projects (I) P. Ltd (2015) 7 SCALE638(hereinafter `Bright Power') and recently in Chittaranjan Maity Vs. Union of India (2017) 9 SCC611(hereinafter `Chittaranjan Maity'). Both these cases dealt with the prohibition of award of interest in the context of Section 31(7)(a) of the Arbitration & Conciliation Act, 1996 (hereinafter, 1996 Act). In these two cases the Supreme Court held that when the terms of the agreement had prohibited award of interest, the arbitrator could not award interest pendente lite.

64. Clause 9 in the present case, which deals with interest not being liable to be paid, merely stipulates as under:

"Clause 9..... 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 RFA10092017 Page 50 of 58 (ii) If the tendered value of work exceeds Rs. 5 lacs:

9. months 65. The Clause in the present case does not prohibit award of interest. It merely stipulates that no interest is payable in case of delay due to non-availability of funds, for a period of 6 months and 9 months, meaning thereby any delay beyond the said period would attract interest. This is in contradistinction to clauses which contain absolute prohibitions for payment of interest. The Supreme

Court in Secy, Irrigation Deptt Govt of Orissa Vs. G.C.Roy (1992) 1 SCC508(hereinafter `G.C.Roy') held as under:

"43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions the following principles emerge: (i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code, and there is no reason or principle to hold otherwise in the case of arbitrator. (ii) An arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the arbitrator has no power to award interest pendente the parties. If RFA10092017 Page 51 of 58 lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings. (iii) An arbitrator is the creature of an agreement It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement. (iv) Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such

absolute or universal rule as they appear to, on first impression. Until Jena case almost all the Courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law. (v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred" RFA10092017 Page 52 of 58 66. The judgment of the Constitution Bench in G.C. Roy (supra) was under the Arbitration Act, 1940 where a provision similar to Section 37(1)(a) of the 1996 Act, was not present. G.C. Roy (supra) clearly holds that interest would be payable depending on the terms of the contract.

67. Such a clause is clearly violative of the provisions of the Interest Act, 1978 and the Contract Act as has been held in Prem Chand Gupta (supra) wherein this Court has held that non-payment of interest is invalid and void as per Sections 16(2) and 23 of the Contract Act.

68. 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. Obviously, therefore, if payments are made, whether on a queue basis or otherwise, beyond the period of 6 months and 9 months, interest is payable.

69. In view of the question of interest having been gone into detail and non-payment having been held to be illegal by various Single Judges of this Court, in cases involving the Corporations, it is held that non-payment of interest beyond the period of 6 months and 9 months, as stipulated in Clause 9 of the General Conditions of Contract, would be contrary to law. Hence, the Contractors are entitled for payment of interest after a period of 6 months - 9 months respectively.

RFA10092017 Page 53 of 58 70. It is completely unconscionable and illegal for the Corporation to argue that no interest is payable. Thus, in those cases where the Contractor has complied with the various conditions in respect of Principal and refund of Security deposit, interest would be payable. Conclusions and Findings 71. The General Conditions of Contract i.e., clauses 7 and 9 which are admittedly part of the work orders issued by both the Nr DMC 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. RFA10092017 Page 54 of 58 72. 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.

73. 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; 74. 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.

75. 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. RFA10092017 Page 55 of 58 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. Obviously, therefore, if payments are made, whether on a queue basis or otherwise, beyond the period of 6 months and 9 months, interest is payable. 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. f) The Security amount/Earnest money deposited would be refundable upon the fulfilment of the conditions contained in Clauses RFA10092017 Page 56 of 58 17 and 45 of the General Conditions of Contract. Interest would be payable on delayed payments. Final Decree on facts 76. The Trial Court, in its judgment dated 26th September, 2016, has directed a decree for the entire sum along with interest. The interest rate is being modified

and insofar as refund of security amount is concerned, interest is being granted only from the date of filing of the suit, as the records do not reflect either compliance or non-compliance with Clauses 17 and 45 of the General Conditions of Contract. However, insofar as the Principal amount is concerned, the same has been calculated based on the final bills passed and interest is being awarded after the expiry of the nine month period, as specified in Clause 9.

77. On the basis of the facts, the pleadings and the evidence recorded, the Contractors suit is liable to be decreed as under: (1) Decree for the sum of Rs.16,72,963/- (Rs.5,44,747 + Rs.5,65,171 /- + Rs.5,63,045/-) towards principal amount in respect of work order Nos.190, 191 & 272, all passed on 22nd January, 2014 along with interest @ 8% per annum calculated upon the expiry of 9 months from the dates of passing of final bills. (2) A decree for the sum of Rs.1,69,458/- is passed for refund of security amount along with interest @ 8% simple interest p.a. from the date of institution of the suit till date.

78. The Corporation is directed to compute the payments to be made to the Contractor in terms of the principal, security deposit and interest as RFA10092017 Page 57 of 58 decreed above, within four weeks. The payment shall be made within 8 weeks thereafter, failing which, interest @ 12% per annum would be payable, upon expiry of the said period till date of payment.

79. The impugned judgment/decree is modified in the above terms. Decree sheet be drawn accordingly. Appeal stands disposed of along with all pending applications. No order as to costs.

80. By way of separate order passed today in these appeals, certain guidelines are issued. These guidelines shall be read along with the judgments pronounced today in all these appeals. MARCH22 2018/dk/Rahul PRATHIBA M. SINGH, J.

Judge RFA10092017 Page 58 of 58 $~ * 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

2203.2018 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, Nr DMC) and East Delhi Municipal Corporation (hereinafter, EDMC), on the other. Nr DMC 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; RFA10092017 Page 1 of 4 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; RFA10092017 Page 2 of 4 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 Contractors 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, RFA10092017 Page 3 of 4 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.

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